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No. 12808

United States
Court of Appeals
For the Ninth Circuit.

BANKERS LIFE COMPANY, a Corporation,

Appellant,

vs.

RUTH JACOBY,

Appellee.

Transcript of Record

**Appeal from the United States District Court,
Northern District of California,
Southern Division.**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

F. ELDRED BOLAND,

BURTON L. WALSH,

KNIGHT, BOLAND & RIORDAN,

444 California Street,
San Francisco, California.
Attorneys for Defendant and Appellant.

FRANCIS T. CORNISH,

2140 Shattuck Avenue,
Berkeley, California.
Attorney for Plaintiff and Appellee.

In the District Court of the United States
for the Northern District of California
No. 29187G

RUTH JACOBY,

Plaintiff,

vs.

BANKERS LIFE COMPANY, a Corporation,
Defendant.

COMPLAINT FOR DECLARATORY RELIEF

Plaintiff above named complains of the defendant above named and for cause of action alleges:

I.

That the jurisdiction of this court is based upon diversity of citizenship in that plaintiff is a citizen of the State of California and resides in the Northern District of California and defendant is a corporation organized and existing under and by virtue of the laws of the State of Iowa, has its principal place of business in the State of Iowa and is a citizen of the State of Iowa.

II.

That the amount in controversy in this action is in excess of $3,000.00, to wit, is a policy of life insurance in principal sum of $5,000.00 upon the life of one Lionel A. Jacoby.

III.

That the only claimant to said policy of life insurance is this plaintiff; that at one time Betty Jacoby and Lionel A. Jacoby claimed to be the owners of said policy, but heretofore the United States District Court for the District of Arkansas, in an action in which this plaintiff was plaintiff and Betty Jacoby and Lionel A. Jacoby were defendants duly gave and made its order directing Betty Jacoby and Lionel A. Jacoby to transfer said policy to this plaintiff, and in default of such transfer being made duly gave and made its order appointing R. G. Hines the agent of Betty Jacoby and Lionel A. Jacoby to make said transfer and pursuant to that authority on January 14, 1949, said R. G. Hines, as such agent aforesaid, sold, assigned and transferred the right, title and interest of Betty Jacoby and Lionel A. Jacoby in said policy to plaintiff and plaintiff ever since has been and now is the owner thereof.

IV.

That the subject of this action is the aforesaid policy, which is an agreement in writing between Lionel A. Jacoby and defendant by virtue of which defendant agreed to pay to any person designated by Lionel A. Jacoby the sum of $5,000.00 upon the death of Lionel A. Jacoby and some different or lesser sum to Lionel A. Jacoby upon demand of the said Lionel A. Jacoby and surrender of said policy.

V.

That plaintiff is unable to surrender said policy for the reason that after said United States District Court for the District of Arkansas made its judgment aforesaid, Lionel A. Jacoby, in contempt of said judgment, absconded and is now a fugitive from justice and his whereabouts is unknown and he and only he knows the whereabouts of said policy; that Betty Jacoby is the beneficiary named in said policy, and she, too, has absconded in contempt of said judgment and her whereabouts is unknown.

VI.

That attached hereto and marked Exhibit "A" is a true copy of the assignment made by R. G. Hines as agent aforesaid, and plaintiff has delivered a duplicate original thereof to defendant and defendant has possession thereof. That attached hereto and marked Exhibit "B" is a true copy of said order of said United States District Court for the District of Arkansas and plaintiff has delivered a certified copy of said original order to defendant and defendant has possession thereof.

VII.

That plaintiff asks relief pursuant to U. S. Code, Title 28, Section 400 for the reason that notwithstanding said assignment, said policy has been lapsed for non-payment of premiums and defendant refuses to recognize in plaintiff any right in said policy unless plaintiff delivers possession of said policy to defendant, and insists that the sole

and only right which plaintiff may exercise, and then only if plaintiff surrenders said policy, is in the event Lionel A. Jacoby dies within 19 years defendant will pay to plaintiff upon delivery of said policy to defendant the sum of $5,000.00.

VIII.

That plaintiff contends and insists that with or without the delivery of said policy to defendant, plaintiff is entitled to elect and demand the same cash surrender value that Lionel A. Jacoby could have demanded upon surrender of said policy upon her making a first demand therefor, or to await the death of Lionel A. Jacoby within 19 years and then receive from defendant the sum of $5,000.00 without surrender or delivery of said policy to defendant.

Wherefore plaintiff prays that this court determine as between plaintiff and defendant the rights of plaintiff in said policy, and particularly the rights of plaintiff in the event possession of said policy cannot hereafter be delivered to defendant, and the right of plaintiff to exercise the right given to Lionel A. Jacoby to surrender his rights under said policy for the payment of cash, and for such other and further relief as may be proper in the premises.

/s/ FRANCIS T. CORNISH,
Attorney for Plaintiff.

State of California,
County of Alameda—ss.

Ruth Jacoby, being first duly sworn, deposes and says: That she is the plaintiff above named, that

she has read the foregoing Complaint for Declaratory Relief and knows the contents thereof; that the facts therein stated are true of her own knowledge, except as to the facts therein stated on information and belief, and as to those facts she believes it to be true.

/s/ RUTH JACOBY.

Subscribed and sworn to before me this 28th day of September, 1949.

[Seal] /s/ FRANCIS M. GUIDICI,
Notary Public in and for the County of Alameda, State of California.

EXHIBIT A

Absolute Assignment

For value received, the undersigned hereby sell, assign, transfer and set over absolutely unto Ruth Jacoby, whose Post Office address is 448 - 41st Street, City of Oakland, State of California, all of the undersigned's right, title and interest in and to contract No. 882714, issued by Bankers Life Company, Des Moines, Iowa, to or upon the life of Lionel A. Jacoby, together with all of the undersigneds' powers, privileges, benefits and advantages therein provided or derived therefrom (including, unless otherwise restricted, but not limited to the following: any dividends, loan values, surrender values, disability benefits and the power to change the beneficiary thereunder) subject to all the terms and conditions in said contract and any indebtedness thereon.

This Assignment Is not Given as Collateral Se-

curity for the Payment of any Indebtedness but Is Made and Intended to Transfer to the Assignee Abolutely and Irrevocably all Incidents of Ownership in Said Contract. This Assignment Does not Constitute a Change of Beneficiary.

Further notices and correspondence regarding this contract are to be directed to the assignee at the address given above, or to such other address as the assignee may direct in writing. The assignee as owner shall have the power to execute without the undersigned joining, all requests, releases, agreements or other instruments necessary or required to enable the assignee to realize the rights, powers, privileges, benefits and advantages hereby transferred, the same to be effective and binding as if executed by the undersigned.

Witness my hand at Fort Smith, in the State of Arkansas this 14th day of January, 1949.

R. G. HINES,

Court appointed agent of Lionel A. Jacoby and Betty Jacoby, his wife, per attached certified copy of order in Civil Case No. 787 United States District Court for the Western District of Arkansas, Fort Smith Division.

Witnesses:

/s/ ALLIE G. BLAND,
1215 N. 13 Street,
Fort Smith, Arkansas.

HUGH M. BLAND,
200 Professional Bldg.,
Fort Smith, Arkansas.

EXHIBIT B

In the United States District Court, Western District of Arkansas, Fort Smith Division
No. 787 Civil

RUTH JACOBY,

Plaintiff,

vs.

LIONEL JACOBY and BETTY JACOBY,

Defendants.

ORDER

This matter comes on to be heard upon the application of the plaintiff to appoint some suitable person to act in the place and stead of Lionel A. Jacoby and Betty Jacoby to execute such transfers, papers, assignments, documents, and conveyances as may be necessary to carry into effect said judgment ordered and directed herein on the 22nd day of November, 1948, under the terms and provisions of Rule 70 of the Federal Rules of Civil Procedure, and it appearing to the Court that the defendants, and each of them, have absconded from the jurisdiction of this Court and failed within the time allowed in said decree to execute the necessary transfers, papers, assignments, documents, and conveyances, as they were ordered to do and that R. G. Hines of Fort Smith, Arkansas, is a suitable person to execute such conveyances in the place and stead of said defendants, and when so done by him, his acts to have the same effect as if done by the defendants.

It Is Therefore Ordered that R. G. Hines be, and he hereby is, appointed and directed by this Court to sign the name of Lionel A. Jacoby to a proper conveyance of his one-half (½) interest in the vacant lot in Orange Heights, Oroville, California, and to execute the same to the plaintiff, Ruth Jacoby, in the place and stead of Lionel A. Jacoby, such conveyance to be as effective when so done as if done by the defendant, Lionel A. Jacoby.

It Is Further Ordered that R. G. Hines be, and he hereby is, appointed and directed to execute an absolute assignment of all of the interest of the defendants, Lionel A. Jacoby and Betty Jacoby, to a certain policy of insurance No. 882714, issued by the Bankers Life Insurance Company of Des Moines, Iowa, and to sign their names to said assignment and perform every act and deed necessary to effect an absolute assignment of said policy to the plaintiff, Ruth Jacoby, his acts and deeds in so doing to have the same effect as if done by the defendants, Lionel A. Jacoby and Betty Jacoby.

Dated at Fort Smith, Arkansas, this 12th day of Januay, 1949.

JNO. E. MILLER,
United States District Judge.

Filed Jan. 12, 1949.
TRUSS RUSSELL,
Clerk.

[Endorsed]: Filed October 5, 1949.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT BANKERS LIFE COMPANY

Defendant Bankers Life Company, a corporation, answers plaintiff's Complaint as follows:

I.

Admits the allegations of Paragraph I.

II.

Denies all and singular the allegations of Paragraph II. Denies that the amount in controversy is in excess of $3,000. Denies that any amount whatsoever is in controversy. Denies that there is any justiciable controversy.

In this connection defendant alleges that there are two other suits now pending in other courts concerning the subject matter of this action. The first suit is in the Superior Court of the State of California in and for the County of Alameda, entitled, "Frances Guidici, Plaintiff, vs. Lionel A. Jacoby, Betty M. Jacoby, Ida Jacoby, Bankers Life Company, a corporation, and the Mutual Life Insurance Company of New York, a corporation, Defendants," numbered 208,570, records of said court. In that case the plaintiff is the receiver for Ruth Jacoby, the plaintiff herein. The second suit is in the District Court of the United States, Western District of Arkansas, Forth Worth Division, entitled, "Ruth Jacoby, Plaintiff, vs. Lionel A. Jacoby and Betty Jacoby, Defendants," and is

Civil Action No. 787, records of said court. The objects and purposes of both of those actions are to force the Defendant Bankers Life Company to pay to plaintiff the cash surrender value of the defendant's policy No. 882714 issued upon the life of Lionel A. Jacoby without the actual surrender of the policy itself. That is contrary to the policy provisions which require the surrender of said policy as a condition precedent to the payment of the cash surrender value.

III.

Denies all and singular the allegations of Paragraph III and alleges that on February 14th, 1936, plaintiff declared in writing that said policy No. 882714 was the separate property of Lionel A. Jacoby, and alleges that on July 15th, 1947, Betty M. Jacoby became the owner of said policy and ever since has been and is now the owner of said policy. Defendant further alleges that plaintiff has no interest in said policy.

IV.

Denies all and singular the allegations of Paragraph IV.

V.

For lack of information or belief defendant denies all and singular the allegations of Paragraph V.

VI.

Answering Paragraph VI of the Complaint, defendant admits that Exhibit "A" appears to be a copy of a document delivered to defendant and now

in its possession, and admits that Exhibit "B" appears to be a copy of a portion of a document delivered to defendant and now in its possession, but defendant has no information that the purported certification thereof is valid. Denies all and singular the allegations of Paragraph VI not herein expressly admitted.

VII.

Answering Paragraph VII, defendant denies all and singular the allegations thereof, except it admits the policy has been lapsed for non-payment of premiums and in this connection alleges as follows:

Policy No. 882714 issued to Lionel A. Jacoby became in default for non-payment of the semi-annual premium, amounting to $78.05, due December 7, 1948, and the grace period provided for the payment of this premium expired on January 7, 1949, without payment of said premium or any part thereof.

On December 7, 1948, the policy according to its terms provided a total cash value of $2,022.88, including dividend credits amounting to $490.78. Pursuant to the terms of the policy said total cash value of $2,022.88 was applied to purchase extended term insurance to the amount of $5,000.00 for a period of 25 years and 84 days from December 7, 1948.

VIII.

Answering Paragraph VIII, defendant alleges that there has been no demand made upon it for the cash surrender value of said policy by any person entitled to make such demand, and defendant further alleges that Policy No. 882714 has never been

surrendered, or offered for surrender, to defendant by any one.

As a separate defense, defendant alleges that:

I.

The Complaint does not state a claim against defendant.

As a second separate defense, defendant alleges that:

I.

The Complaint does not state a claim for declaratory relief.

As a third separate defense, defendant alleges that:

I.

The Court does not have jurisdiction of the subject matter of this action because the suit is based upon diversity of citizenship and the amount in controversy is less than $3,000.00.

As a fourth separate defense, defendant alleges that:

I.

The Complaint does not state a claim because necessary parties, to wit, Lionel A. Jacoby and Betty M. Jacoby, are not parties hereto.

As a fifth separate defense, defendant alleges that:

I.

Defendant is a corporation incorporated under the laws of the State of Iowa and is admitted to do and is doing a life insurance business in the State of California, and subject to the jurisdiction of the courts of the State of California.

II.

There is now pending in the Superior Court of the State of California in and for the County of Alameda action No. 208570, wherein plaintiff herein, by and through her receiver, Francis Guidici, is suing this same defendant for the same thing she is suing for here, namely, the surrender value of defendant's Policy No. 882714.

III.

The Superior Court of the State of California in and for the County of Alameda is a court of general jurisdiction and has acquired jurisdiction over this defendant, and the plaintiff can obtain adequate relief in said Superior Court action without prosecuting this action or otherwise creating a multiplicity of suits and without unnecessarily invoking the doubtful jurisdiction of this court.

IV.

For the reasons herein set forth this Court should decline to entertain jurisdiction of, or attempt to adjudicate, the plaintiff's claim.

Wherefore, defendant prays that plaintiff go hence without pay, for its costs of suit and such other relief as may be proper.

/s/ BURTON L. WALSH,
KNIGHT, BOLAND &
RIORDAN,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 18, 1949.

In the District Court of the United States for the Northern District of California, Southern Division

No. 29187

RUTH JACOBY,

Plaintiff,

vs.

BANKERS LIFE COMPANY, a Corporation,

Defendant.

MEMORANDUM OPINION

FRANCIS T. CORNISH, ESQ.,
2140 Shattuck Avenue,
Berkeley 4, California,
Attorney for Plaintiff.

BURTON L. WALSH, ESQ.,
KNIGHT, BOLAND & RIORDAN,
444 California Street,
San Francisco 4, California,
Attorneys for Defendant.

Erskine, District Judge

It is the opinion of this Court that the legal effect of the judgment and decree in the case of Ruth Jacoby v. Lionel A. Jacoby and Betty Jacoby, filed in the United States District Court for the Western District of Arkansas, on November 22, 1948, together with the order entered by said Court in said action on January 12, 1949, and the "Absolute Assignment" executed on January 14, 1949, by

the court appointed agent of Lionel A. Jacoby and Betty Jacoby, was to transfer to Ruth Jacoby, the plaintiff in this action, all the right, title, interest and incidents of ownership in Bankers Life insurance policy number 882714 previously held by Lionel A. Jacoby and Betty Jacoby.

This Court further holds that at the time of said assignment, default had been made in the payment of the premium on said policy and the policy not having been surrendered for cash or for a paid-up participating policy within one month after said default, as required by the terms of the policy, the automatic extended term insurance clause of the policy went into effect, the amount of said extended term insurance being equal to the face amount of the policy and existing dividends, if any. However, the policy also provides that "extended insurance . . . may be surrendered at any time for a cash value equal to the full reserve thereon at the time of the surrender . . ." Ruth Jacoby, the present owner of all right, title and interest in said policy, is entitled to this cash surrender value, if she desires to exercise said option. If the plaintiff desires that the policy retain its present status of extended term insurance, she has the right to name the beneficiary and change said beneficiary at any time.

The defendant company will not be prejudiced by such payment or made subject to double liability. By virtue of the court assignment, Lionel A. and Betty Jacoby were divested of all interest in said policy. The defendant has been given no-

tice of said assignment. There is no evidence of any assignment by Lionel Jacoby either prior or subsequent to said court assignment. Any such attempted assignment would be a nullity and not binding upon the defendant company.

Findings of fact, conclusions of law and judgment in accordance with the opinions expressed herein will be prepared by counsel.

Dated: October 16th, 1950.

/s/ HERBERT W. ERSKINE,
United States District Judge.

[Endorsed]: Filed October 16, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial on October 3, 1950, before the above-named Court, Honorable Herbert W. Erskine presiding, sitting without a jury, a jury trial having been expressly waived by all the parties, Francis T. Cornish, Esq., appearing as attorney for plaintiff and Messrs. Knight, Boland & Riordan and Burton L. Walsh, Esq., appearing as attorneys for defendant. Evidence both documentary and oral was adduced and the cause was thereupon argued and submitted, and the Court being fully advised, now makes its findings of fact as follows:

FINDINGS OF FACT

I.

At the time of the commencement of this action plaintiff was a citizen of the State of California and a resident of the Northern District of California, Southern Division thereof, and defendant was a corporation incorporated under the laws of the State of Iowa and was admitted to do, and is doing, a life insurance business in the State of California.

II.

The amount in controvery exceeds the sum of $3,000.00, exclusive of interest and costs.

III.

On June 7, 1930, defendant Bankers Life Company made, issued and delivered its policy No. 882714 to Lionel A. Jacoby insuring his life to the face amount of $5,000.00 upon the Paid Up at Age 65 Plan. The insured reserved the right to revoke the beneficiary. The insured also elected to have dividends left to accumulate to the credit of the policy, with interest at not less than three and one-half per cent per annum as determined by the company, and payable at the maturity of the policy by death or endowment or upon surrender of the policy for cash or reduced paid-up insurance. The semi-annual premium payable on the 7th day of June and the 7th day of December of each year until paid up is $78.05.

IV.

As to Change of Beneficiary the policy provides as follows:

"When the right of revocation has been reserved or in case of the death of any Beneficiary under either a revocable or irrevocable designation, the Insured, subject to any existing assignment of this Policy may, while the Policy is in force, designate a new Beneficiary with or without reserving right of revocation by filing written notice thereof at the Home Office of the Company accompanied by the Policy for suitable indorsement thereon. Such change shall take effect when indorsed on the Policy by the Company and not before. If any Beneficiary shall die before the Insured, the interest of such Beneficiary shall pass equally to the survivor or survivors, unless otherwise provided in the Policy. If no Beneficiary shall survive the Insured, then payment shall be made to the executors or administrators of the Insured."

V.

On July 8, 1947, pursuant to the above policy provision, the beneficiary of said policy was changed to Betty M. Jacoby, wife of the insured, and said change of beneficiary was endorsed on the policy.

VI.

As to Assignment, the policy provides as follows:

"No assignment of this Policy shall be binding upon the Company unless it be filed with the Company at its Home Office. The original assignment must be produced when the Policy is presented for payment. The Company as-

sumes no responsibility as to the validity of any assignment."

VII.

On July 17, 1947, defendant received in its home office in Des Moines, Iowa, the following document, purporting to be an assignment by Lionel A. Jacoby of all his right, title and interest in and to said Policy No. 882714 to Betty M. Jacoby:

"Original

"Duplicate Received and Filed
"Home Office July 17, 1947
"Bankers Life Company
"By J. S. Corley, Secretary

"For Value Received, I hereby assign, transfer and set over to Betty M. Jacoby, whose post office address is Route 1, Pleasant Hill, Missouri, all my right, title and interest in and to the policy of insurance known as No. 882714 dated ..... issued by Bankers Life Company of Des Moines, Iowa, on the life of Lionel A. Jacoby and I hereby guarantee the validity and sufficiency of the foregoing assignment and the same will forever warrant and defend.

"Witness my hand and seal at Kansas City, Mo., this 15th day of July, 1947.

"LIONEL A. JACOBY. (LS)
"..... (LS)

"Witness

"ROSE PELLIGRINI.

"State of Missoui,
"County of Jackson—ss.

"On this 15th day of July, 1947, before me personally came Lionel A. Jacoby to me known and known to me to be the person described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

"FRANCES E. COOKE,
"Notary Public.

"My Commission expires July 23, 1947.

"The duplicate original of this assignment was filed in the office of the Bankers Life Company of Des Moines, Iowa, on the 15th day of July, 1947."

VIII.

The insured Lionel A. Jacoby continued to pay the semi-annual premiums of $78.05 to and including June 7, 1948.

IX.

The policy contains the following Non-Forfeiture Provisions:

> "At the end of any Policy year or within one month after any default in payment of premium, but not later, provided three full years' premiums shall have been paid, this Policy may be surrendered with a proper release to the Company at its Home Office for:
>
> "(A) Its Cash Surrender Value.
>
> "This value shall be equal to the reserve on the face amount of insurance and on any paid up additions less any indebtedness on the Policy and a charge not exceeding one per cent of

the amount of the Policy for the third to the ninth years inclusive, after which no surrender charge shall be made. There is no cash value to the Total and Permanent Disability or Double Indemnity Benefits. (See Table of Guarantees below.)

"Or, (B) A Paid Up Participating Policy payable as herein provided.

"The amount of the paid up Policy will be such as the cash surrender value, above provided for, will purchase at the attained age of the Insured, using net single premium rates according to the reserve basis stated on page one. (See Table of Guarantees below.)

"If the Policy be not surrendered for cash or paid up, as above provided, after payment of three full years' premium and upon default in payment of any premium the insurance will be automatically extended from the due date of the premium in default without participation in surplus. The amount of insurance will be equal to the face amount of the Policy and existing dividend additions, if any, less any indebtedness to the Company hereon, said indebtedness being cancelled thereby.

"The term of extended insurance will be such as the cash surrender value, above provided, and dividend credits, if any, will purchase at the attained age of the Insured, using net single premium rates according to the reserve basis on page one. The term of extended insurance includes the days of grace. If the premium loan provision has been exercised, it will replace this

option in so far as applicable. The Policy need not be surrendered for endorsement. Where the laws of any state in which this Policy is delivered conflict with the above method, such laws will govern. (See Table of Guarantees below.)

"The extended insurance or the paid-up Policy or any paid-up additions may be surrendered at any time for a cash value equal to the full reserve thereon at the time of surrender less any indebtedness to the Company."

X.

The policy lapsed for non-payment of premium due December 7, 1948. Plaintiff Ruth Jacoby knew the policy provided for thirty-one days of grace for the payment of the premium and she knew before the end of the grace period that the premium had not been paid on the due date of December 7, 1948, but she did not pay that or any other premium.

XI.

On December 7, 1948, the policy had a total cash surrender value of $$2,022.88, including dividend credits amounting to $490.78.

XII.

Said policy No. 882714 has never been surrendered for any cash surrender value or for any paid-up participating policy.

XIII.

Pursuant to the Non-Forfeiture Provisions of the policy set forth in Finding IX above, the in-

surance upon the life of Lionel A. Jacoby was automatically extended from December 7, 1948, without participation in surplus. The amount of said extended insurance is equal to the face amount of the policy, namely $5,000.00. The term of said extended insurance is 25 years and 84 days from December 7, 1948, that being the term which the cash surrender value, including dividend credits, as of December 7, 1948, will purchase at the attained age of the insured.

XIV.

On November 22, 1948, the United States District Court in Arkansas rendered the following judgment:

"District Court of the United States, Western District of Arkansas, Fort Smith Division

"Civil Action No. 787

"RUTH JACOBY,

"Plaintiff,

"vs.

"LIONEL A. JACOBY and BETTY JACOBY,

"Defendants.

"JUDGMENT AND DECREE

"On this 22nd day of November, 1948, comes on this cause for trial before the court without the intervention of a jury, the plaintiff appearing in person and by Messrs. Bland, Kincannon & Bethell, her attorneys, and the defendants appearing in per-

son and by Messrs. Partain, Agee & Partain, their attorneys.

"Upon consideration of the pleadings, depositions and testimony of witnesses, together with the exhibits thereto, the court has made and filed herein its Findings of Fact and Conclusions of Law, separately stated, and in accordance with same It Is Ordered, Adjudged and Decreed:

"That the plaintiff, Ruth Jacoby, shall have and recover of and from the defendant, Lionel A. Jacoby, the sum of $5700.00, with interest at the rate of 6 per cent per annum to be calculated on the monthly payments that should have been made on the 15th day of each and every month since March 15, 1947, together with the costs of this action;

"That the preliminary injunction entered herein on October 25, 1948, be and it is hereby made permanent, and the defendants and each of them, their agents, servants, and all persons acting by and under their control and authority, are hereby restrained and enjoined from sequestering, encumbering, destroying, alienating, or removing from the jurisdiction of this court any property, real or personal, now in their possession or under their control;

"That the one-half interest owned by the defendant Lionel A. Jacoby, in the vacant lot in Orange Heights, Oroville, California, be subject to the payment of the judgment herein;

"That the defendants Lionel A. Jacoby and Betty Jacoby surrender to the plaintiff all their right, title and claim upon the policy of insurance, No. 822714,

issued by the Bankers Life Company of Des Moines, Iowa, and that the cash value of said insurance policy be applied to the payment of the amount herein adjudged to be due the plaintiff;

"That the value of the Cadillac automobile now in the possession of the defendants be applied to the payment of the judgment herein;

"That for the purposes of reducing the said automobile and the said insurance policy to cash, the defendants, either or both, are authorized, subject to the approval of the court, to execute such assignments, transfers and conveyances as may be necessary, but all payments and considerations received for said assignment, transfers, and conveyances shall be made payable to the plaintiff, Ruth Jacoby, and applied to the payment of the judgment herein;

"That the defendant Lionel A. Jacoby be and is given 30 days from this date in which to pay the judgment herein rendered, and in the event the said defendant shall not have paid and discharged said judgment in full or or before 30 days from this date, citation and rule will be issued, upon the request of plaintiff, requiring the said defendant, Lionel A. Jacoby, to show cause why he should not be held in contempt of court; and

"That jurisdiction of this cause is retained until further order of the court.

[Seal] "JNO. E, MILLER,
"U. S. District Judge."

XV.

On January 12, 1949, said United States District Court in Arkansas made the following order concerning the foregoing judgment:

"In the United States District Court, Western District of Arkansas, Fort Smith Division

"No. 787 Civil

"RUTH JACOBY,

"Plaintiff,

"vs.

"LIONEL A. JACOBY and BETTY JACOBY,

"Defendants.

"ORDER

"It appearing to the Court upon motion of the plaintiff that there was a clerical mistake in the judgment rendered herein on the 22nd day of November, 1948, in that the policy of insurance issued by the Bankers Life Insurance Company of Des Moines, Iowa, was described as policy No. 822714, when in truth and in fact said policy should have been numbered 882714, and that said judgment should be corrected to so show.

"It Is Therefore Ordered, that the Clerk of this Court be, and he hereby is, ordered and directed to correct said judgment to show that the policy issued by the Bankers Life Insurance Company of Des Moines, Iowa, is No. 882714, instead of No. 822714.

"Dated at Fort Smith, Arkansas, this 12th day of January, 1949.

"JNO. E. MILLER,
"United States District Judge.

"Filed Jan. 12, 1949.
"TRUSS RUSSELL,
"Clerk."

XVI.

On January 12, 1949, the said United States District Court in Arkansas made the following order:

"In the United States District Court, Western District of Arkansas, Fort Smith Division
"No. 787 Civil

"RUTH JACOBY,
"Plaintiff,

vs.

"LIONEL A. JACOBY and BETTY JACOBY,
"Defendants.

"ORDER

"This matter comes on to be heard upon the application of the plaintiff to appoint some suitable person to act in the place and stead of Lionel A. Jacoby and Betty Jacoby to execute such transfers, papers, assignments, documents, and conveyances as may be necessary to carry into effect said judgment ordered and directed herein on the 22nd day of November, 1948, under the terms and provisions

of Rule 70 of the Federal Rules of Civil Procedure, and it appearing to the Court that the defendants, and each of them, have absconded from the jurisdiction of this Court and failed within the time allowed in said decree to execute the necessary transfers, papers, assignments, documents, and conveyances, as they were ordered to do and that R. G. Hines of Fort Smith, Arkansas, is a suitable person to execute such conveyance in the place and stead of said defendants, and when so done by him, his acts to have the same effect as if done by the defendants.

"It Is Therefore Ordered that R. G. Hines be, and he hereby is, appointed and directed by this Court to sign the name of Lionel A. Jacoby to a proper conveyance of his one-half (½) interest in the vacant lot in Orange Heights, Oroville, California, and to execute the same to the plaintiff, Ruth Jacoby, in the place and stead of Lionel A. Jacoby, such conveyance to be as effective when so done as if done by the defendant, Lionel A. Jacoby.

"It Is Further Ordered that R. G. Hines be, and he hereby is, appointed and directed to execute an absolute assignment of all of the interest of the defendants, Lionel A. Jacoby and Betty Jacoby, to a certain policy of insurance No. 882714, issued by the Bankers Life Insurance Company of Des Moines, Iowa, and to sign their names to said assignment and perform every act and deed necessary to effect an absolute assignment of said policy to the plaintiff, Ruth Jacoby, his acts and deeds in so doing to

have the same effect as if done by the defendants, Lionel A. Jacoby and Betty Jacoby.

"Dated at Fort Smith, Arkansas, this 12th day of January, 1949.

"JNO. E. MILLER,
"United States District
Judge.

"Filed Jan. 12, 1949.
"TRUSS RUSSELL,
Clerk."

XVII.

On January 14, 1949, the following document was executed by R. G. Hines:

"ABSOLUTE ASSIGNMENT

"For value received, the undersigned hereby sell, assign, transfer and set over absolutely unto Ruth Jacoby, whose Post Office address is 448-41st Street, City of Oakland, State of California, all of the undersigned's right, title and interest in and to contract No. 882714, issued by Bankers Life Company, Des Moines, Iowa, to or upon the life of Lionel A. Jacoby, together with all of the undersigneds' powers, privileges, benefits and advantages therein provided or derived therefrom (including, unless otherwise restricted, but not limited to the following: any dividends, loan values, surrender values, disability benefits and the power to change the beneficiary thereunder) subject to all the terms and conditions in said contract and any indebtedness thereon.

"This Assignment is not Given as Collateral Se-

curity for the Payment of any Indebtedness but Is Made and Intended to Transfer to the Assignee Absolutely and Irrevocably all Incidents of Ownership in Said Contract. This Assignment Does not Constitute a Change of Beneficiary.

"Future notices and correspondence regarding this contract are to be directed to the assignee at the address given above, or to such other address as the assignee may direct in writing. The assignee as owner shall have the power to execute without the undersigned joining, all requests, releases, agreements or other instruments necessary or required to enable the assignee to realize the rights, powers, privileges, benefits and advantages hereby transferred, the same to be effective and binding as if executed by the undersigned.

"Witness my hand at Fort Smith, in the State of Arkansas this 14th day of January, 1949.

/s/ "R. G. HINES,

"Court appointed agent of Lionel A. Jacoby and Betty Jacoby, his wife, per attached certified copy of order in Civil Case No. 787 United States District Court for the Western District of Arkansas, Fort Smith Division.

"Witnesses:

/s/ "ALLIE G. BLAND,
"1215 N. 13 Street
"Fort Smith, Arkansas.

/s/ "HUGH M. BLAND,
"200 Professional Bldg.
"Fort Smith, Arkansas."

XVIII.

Copies of the Judgment, Orders and Assignment set forth in Findings XIV, XV, XVI and XXVII were received by defendant Bankers Life Company at Des Moines, Iowa, on or about January 25, 1949.

XIX.

Policy No. 882714 has never been surrendered to defendant Bankers Life Company for any cash surrender value. Plaintiff Ruth Jacoby does not have possession of said policy and does not know the whereabouts of said policy. The person last known to have possession of said policy No. 882714 is the insured, Lionel A. Jacoby. There is no evidence that said policy has been lost, destroyed or stolen. There is no evidence that Lionel A. Jacoby cannot surrender the policy. The whereabouts of Lionel A. Jacoby are unknown.

XX.

A controversy exists between the parties to this action, first, as to who is the beneficiary entitled to the proceeds of insurance in the event of the death of the insured within the extended term, and second, as to whether the plaintiff, Ruth Jacoby, may obtain from defendant Bankers Life Company the cash surrender value, if any, of the extended term insurance without surrendering the policy to defendant Bankers Life Company.

From the foregoing fiindings of fact the Court concludes as follows:

Conclusions of Law

I.

Ruth Jacoby is the owner of all of Lionel A. Jacoby's and Betty M. Jacoby's right, title and interest in and to Contract No. 882714 issued by Bankers Life Company, Des Moines, Iowa, to or upon the life of Lionel A. Jacoby, together with all of said Lionel A. Jacoby's and Betty M. Jacoby's powers, privileges, benefits and advantages therein provided or derived therefrom (including, unless otherwise restricted but not limited to the following: any dividends, loan values, surrender values, disability benefits and the power to change the beneficiary thereunder) subject to all the terms and conditions in said contract and any indebtedness thereon. Under said Contract No. 882714 the life of Lionel A. Jacoby is insured to the face amount of $5,000.00 on extended insurance for the term of 25 years and 84 days from December 7, 1948, without participation in surplus.

II.

The assignment executed on or about January 14, 1949, by R. G. Hines did not constitute a change of beneficiary under Policy No. 882714.

III.

Betty M. Jacoby is the beneficiary of the extended term insurance upon the life of Lionel A. Jacoby, as provided in defendant Bankers Life Company's Policy No. 882714.

IV.

Plaintiff Ruth Jacoby has the power to change

the beneficiary of Bankers Life Company's Policy No. 882714 by complying with the provisions of said policy relating to change of beneficiary.

V.

The extended insurance may be surrendered at any time for a cash value equal to the full reserve thereon at the time of surrender less any indebtedness to defendant Bankers Life Company. This cash surrender value may be obtained by plaintiff Ruth Jacoby upon compliance with the terms and conditions of said Policy No. 882714.

VI.

Plaintiff is entitled to her costs of suit.

Let judgment be entered accordingly.

Dated: November 10, 1950.

/s/ HERBERT W. ERSKINE,
Judge.

[Endorsed]: Filed November 10, 1950.

In the District Court of the United States for the Northern District of California, Southern Division

No. 29,187

RUTH JACOBY,

Plaintiff,

vs.

BANKERS LIFE COMPANY, a Corporation,

Defendant.

DECLARATORY JUDGMENT

This cause came on regulary for trial on October 3, 1950, before the above named Court, Honorable Herbert W. Erskine presiding, sitting without a jury, a jury trial having been expressly waived by all parties, Francis T. Cornish, Esq., appearing as attorney for plaintiff, and Messrs. Knight, Boland & Riordan and Burton L. Walsh, Esq. appearing as attorneys for defendant. Evidence both documentary and oral was adduced and the cause was thereupon argued and submitted, and the Court having made and filed its Findings of Fact and Conclusions of Law herein, and good cause appearing therefor:

It Is Hereby Ordered And Decreed that Ruth Jacoby is the owner of all of Lionel A. Jacoby's and Betty M. Jacoby's right, title and interest in and to Contract No. 882714 issued by Bankers Life Company, Des Moines, Iowa, to or upon the life of Lionel A. Jacoby, together with all of said Lionel A. Jacoby's and Betty M. Jacoby's powers, privileges, benefits and advantages therein provided or

derived therefrom (including, unless otherwise restricted but not limited to the following: Any dividends, loan values, surrender values, disability benefits and the power to change the beneficiary thereunder) subject to all the terms and conditions in said contract and any indebtedness thereon. Under said Contract No. 882714 the life of Lionel A. Jacoby is insured to the face amount of $5,000.00 on extended insurance for the term of 25 years and 84 days from December 7, 1948, without participation in surplus. Betty M. Jacoby is the beneficiary of said extended insurance under the provisions of said Policy. Plaintiff Ruth Jacoby has the power to change the beneficiary of said extended insurance by complying with the terms and provisions of said Policy 882714. The extended insurance may be surrendered at any time for a cash value equal to the full reserve thereon at the time of surrender less any indebtedness to defendant Bankers Life Company. This cash surrender value may be obtained by plaintiff Ruth Jacoby upon compliance with the terms and conditions of said Policy No. 882714, other than the physical surrender of the policy.

It Is Further Ordered And Decreed that plaintiff Ruth Jacoby shall recover from defendant Bankers Life Company her costs in the amount of $24.72.

Dated: November 10th, 1950.

/s/ HERBERT W. ERSKINE,
Judge.

Lodged October 26, 1950.

[Endorsed]: Filed November 10, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT UNDER RULE 73(b)

Notice Is Hereby Given that Bankers Life Company, a corporation, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on November 13, 1950.

/s/ F. ELDRED BOLAND,
/s/ BURTON L. WALSH,

KNIGHT, BOLAND & RIORDAN,

Attorneys for Appellant, Bankers Life Company, a Corporation.

[Endorsed]: Filed December 11, 1950.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by these Presents,

That we, Bankers Life Company, a Corporation, as principal and Burton L. Walsh, depositing $250 in cash in lieu of surety or sureties, are held and firmly bound unto Ruth Jacoby in the full and just sum of Two Hundred Fifty (250) dollars, to be paid to the said Ruth Jacoby certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this——day of ————————in the year of our Lord One Thousand Nine Hundred and——.

Whereas, lately at a District Court of the United States for the Northern District of California, Southern Division in a suit depending in said Court, between Ruth Jacoby, Plaintiff vs. Bankers Life Company, a Corporation, Defendant a judgment was rendered against the said Bankers Life Company and the said Bankers Life Company having filed in said Court a notice of appeal to reverse the judgment in the aforesaid suit, on appeal to United States Court of Appeals for the Ninth Circuit, at a session of said Court of Appeals to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, That if the said Bankers Life Company shall prosecute its appeal to effect, and satisfy, if for any reason the appeal is dismissed or if the judgment is affirmed or modified such costs as the appellate court may adjudge and award, if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Acknowledged before me the day and year first above written,

[Seal] Bankers Life Company, a Corporation.

[Seal] By /s/ BURTON L. WALSH,
Attorney in fact.

[Seal] By /s/ BURTON L. WALSH,
Depositor.

[Endorsed]: Filed December 11, 1950.

In the District Court of the United States for the Northern District of California, Southern Division

RUTH JACOBY,

Plaintiff,

vs.

BANKERS LIFE COMPANY, a Corporation,

Defendant.

[Title of District Court and Cause.]

STIPULATION AND ORDER FOR STAY OF EXECUTION PENDING APPEAL

It Is Hereby Stipulated that the defendant Bankers Life Company, need not file a supersedeas bond on its appeal from the judgment herein to the United States Court of Appeals for the Ninth Circuit, and plaintiff herein waives the requirement of such bond and agrees that execution on any money judgment entered herein shall be stayed until final decision upon such appeal.

Dated: December 20th, 1950.

/s/ FRANCIS L. CORNISH,
Attorney for Plaintiff.

/s/ F. ELDRED BOLAND,
/s/ BURTON L. WALSH,
Knight, Boland & Riordan,
Attorneys for Defendant.

It Is So Ordered:

/s/ MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed December 27, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents and accompanying exhibits, listed below, are the original filed in this Court in the above-entitled case, and that they constitute the Record on Appeal herein, to-wit:

Complaint for Declaratory Relief and Exhibits A and B.

Summons.

Stipulation and Order Extending Time.

Answer of Defendant Bankers Life Company.

Interrogatories to be Propounded to the Defendant.

Answers to Interrogatories.

Motion to Strike Answer and Render Judgment by Default Against Defendant.

Points and Authorities in Support of Motion to Strike Answer and Render Judgment by Default Against Defendant and in Support of Motion to to Compel Verified Answers to Interrogatories and for Reasonable expenses Including Attorney Fees.

Motion to Compel Verified Answers to Interroga-

tories and for Reasonable Expenses Including Attorney Fees.

Notice of Time and Place of Hearing Motions.

Notice of Motion, and Motion for Summary Judgment Under Rule 56(b). Including Affidavit of Burton L. Walsh in Support of Defendant's Motion for Summary Judgment and Exhibit A, Reasons and List of Authorities in Support of Motion for Summary Judgment Under Rule 56(b), Summary Judgment (in duplicate—unsigned), and Affidavit of Mailing.

Defendant's Reasons and List of Citations of Authorities in Opposition to Plaintiff's Motions to Strike Answer and Render Judgment by Default and to Compel Additional Answers to Interrogatories, etc., and Exhibit A.

Points and Authorities in Opposition to Motion for Summary Judgment.

Defendant's Counter-Affidavit in Support of Its Motion for Summary Judgment.

Affidavit in Opposition to Motion for Summary Judgment and Exhibits A and B.

Additional Answers of Defendant to Plaintiff's Interrogatories.

Affidavit of E. F. Bucknell in Support of Defendant's Motion for Summary Judgment.

Letter of June 9, 1950 to Judge Erskine from Cornish and Cornish.

Affidavit in Opposition to Motion for Summary Judgment Including Exhibits A, B, C, & D.

Affidavit of Francis T. Cornish in Opposition to Motion for Summary Judgment Including Exhibits A, B, C, & D.

Additional Answer of Defendant to Plaintiff's Interrogatory No. 4 Including Exhibit A.

Second Counter-Affidavit of Burton J. Walsh in Support of Defendant's Motion for Summary Judgment Including Exhibit A.

Order—Denying Motion for Summary Judgment, etc.

Clerk's Notice of June 20, 1950 re Certain Motions.

Notice of Motion and Motion to Set for Trial.

Memorandum Opinion.

Findings of Fact and Conclusions of Law.

Declaratory Judgment.

Clerk's Notice of November 13, 1950, of Entry of Declaratory Judgment.

Notice of Taxation of Costs and Memorandum of Costs and Disbursements.

Notice of Appeal to the United States Court of Appeals for the Ninth Circuit Under Rule 73(b).

Bond on Appeal.

Clerk's Notice of December 12, 1950 of filing of Notice of Appeal.

Appellant's Designation of Contents of Record on Appeal (Rule 75(a)).

Statement of Point on Which Appellant Intends to Rely on Appeal (Rule 75(d)).

Stipulation for Stay of Execution Pending Appeal.

Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19.

Defendant's Exhibit A.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 10th day of January, A.D. 1951.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12808. United States Court of Appeals for the Ninth Circuit. Bankers Life Company, a Corporation, Appellant, vs. Ruth Jacoby, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed January 10, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit
No. 12808

RUTH JACOBY,

Plaintiff and Respondent,

vs.

BANKERS LIFE COMPANY, a Corporation,
Defendant and Appellant.

APPELLANT'S STATEMENT OF THE POINT ON WHICH IT INTENDS TO RELY ON THE APPEAL, AND APPELLANT'S DESIGNATION OF THE PARTS OF THE RECORD NECESSARY FOR THE CONSIDERATION THEREOF

I.

Statement of the Point on Appeal

The appellant, Bankers Life Company, intends to rely on this point on appeal:

The judgment which holds that the respondent, Ruth Jacoby, may obtain the cash surrender value of the extended term insurance under Policy No. 882714 without the physical surrender of said policy to appellant, Bankers Life Company, is contrary to and not supported by the Findings of Fact and Conclusions of Law.

II.

Designation of the Parts of the Record Necessary for the Consideration Thereof.

The appellant, Bankers Life Company, designates the following portions of the record which now are or should be on file herein, which it thinks necessary for the consideration of the point on appeal:

1. Complaint for Declaratory Relief;

2. Answer of Defendant Bankers Life Company;

3. Findings of Fact and Conclusions of law;

4. Declaratory Judgment;

5. Notice of Appeal to the United States Court of Appeals for the Ninth Circuit Under Rule 73(b);

6. Bond on Appeal;

7. Stipulation for Stay of Execution Pending Appeal;

8. Statement of Point on Which Appellant Intends to Rely on the Appeal.

9. This Designation of Contents of Record on Appeal.

[Item 26 Memorandum Opinion]

The exhibits are not necessary.

Dated: January 17, 1951.

/s/ F. ELDRED BOLAND,

/s/ BURTON L. WALSH,

KNIGHT, BOLAND & RIORDAN,

Attorneys for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed January 18, 1951.

No. 12,808

United States Court of Appeals
For the Ninth Circuit

BANKERS LIFE COMPANY (a corporation),	*Appellant,*
vs.	
RUTH JACOBY,	*Appellee.*

Appeal from the United States District Court,
Northern District of California,
Southern Division.

APPELLANT'S OPENING BRIEF.

KNIGHT, BOLAND & RIORDAN,
F. ELDRED BOLAND,
BURTON L. WALSH,
444 California Street, San Francisco 4, California,
Attorneys for Appellant.

Subject Index

Table of Authorities Cited

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No. 12,808

United States Court of Appeals

For the Ninth Circuit

BANKERS LIFE COMPANY (a corporation),

Appellant,

vs.

RUTH JACOBY,

Appellee.

**Appeal from the United States District Court,
Northern District of California,
Southern Division.**

APPELLANT'S OPENING BRIEF.

A STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED THAT THE DISTRICT COURT HAD JURISDICTION AND THAT THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION.

The complaint in this civil action alleges complete diversity of citizenship, that is, the appellee is a citizen of California and the appellant is a citizen of Iowa, and it also alleges that the "amount" in controversy is in excess of $3,000, namely, a life insurance policy in the principal sum of $5,000. See Transcript of Record, page 3. (Hereafter, for brevity, Transcript of Record shall be abbreviated to Tr.) It also appears

from appellant's Answer that the matter in controversy exceeds the value of $3,000, exclusive of interest and costs. See Tr. p. 13. The pleadings (Complaint and Answer) disclose an actual controversy concerning the ownership of the life insurance policy and the effect thereon of an assignment executed by an agent appointed by a United States District Court in Arkansas, which controversy warrants a declaration by the United States District Court in California of the rights and other legal relations of the interested parties. See Tr. pp. 4-15.

A final Declaratory Judgment was rendered by the District Court. (Tr. pp. 36-37.)

The statutory provisions believed to sustain the jurisdiction of the District Court from whence this appeal is taken are Title 28, United States Code, Sections 1332(a)(1) and 2201.

The statutory provisions believed to sustain the jurisdiction of this Court to review the Judgment are Title 28, United States Code, Sections 1291 and 2201.

A CONCISE ABSTRACT OR STATEMENT OF THE CASE, PRESENTING SUCCINCTLY THE QUESTION INVOLVED AND THE MANNER IN WHICH IT IS RAISED.

(a) The question involved.

The following is a succinct statement of the question involved:

> Where a life insurance policy provides it may be surrendered at any time for its cash surrender

value, and the policy has been assigned to a person by a court-appointed agent of the insured and the named beneficiary, but said assignment has not changed the beneficiary, and said policy is neither lost, destroyed nor stolen but was last known to be in the possession of the insured whose whereabouts are unknown, and there is no evidence that said insured cannot surrender the policy, can the assignee obtain the cash surrender value of the policy without the physical surrender of the policy to the insurer?

(b) The manner in which the question is raised.

This appeal comes up, in effect, upon the Judgment Roll. We believe the Findings of Fact and Conclusions of Law state the case quite well, and therefore they are adopted herein. A concise statement of the case follows.

On June 7, 1930, appellant, Bankers Life Company, issued its policy No. 882714 to Lionel A. Jacoby, insuring his life to the face amount of $5,000. (Finding III, Tr. p. 19.) The contract was made in California. (This does not expressly appear in the findings but it is a fact with which we are sure appellee will agree.) The insured reserved the right to revoke the beneficiary. (Finding III, Tr. p. 19.) Appellee is the insured's first wife. After a divorce and remarriage the insured changed the beneficiary to his second wife, Betty M. Jacoby. (Finding V, Tr. p. 20.) Later, while in Missouri, the insured assigned the policy to said Betty M. Jacoby. (Finding VII, Tr. p. 21.) The policy lapsed for non-payment of premium due De-

cember 7, 1948, and in accordance with the policy terms the insurance thereunder was automatically extended in the same amount of $5,000 for a term of 25 years and 84 days from December 7, 1948. (Findings IX to XIII, inclusive, Tr. pp. 22-25.)

In the meantime, appellee had sued the insured, Lionel A. Jacoby, and his second wife, Betty Jacoby, for money in the United States District Court in Arkansas, and on November 22, 1948, that Court rendered a Judgment in favor of Ruth Jacoby and against Lionel A. Jacoby for $5,700. (Finding XIV, Tr. pp. 25-27.) The Judgment also ordered Lionel A. Jacoby and Betty Jacoby to apply to the payment of the Judgment the cash value of Bankers Life Policy No. *822714.* That was the wrong policy. The correct one is No. *882714.* On January 12, 1949, the said United States District Court in Arkansas made an Order changing the policy number in its Judgment of November 22, 1948, from 822714 to 882714. (Finding XV, Tr. pp. 28-29.)

The provisions of Policy No. 882714 require that the policy itself be surrendered to appellant before the cash surrender value can be paid by appellant. (Finding IX, Tr. pp. 22-24.)

Apparently the insured and Betty Jacoby left the jurisdiction of the Court in Arkansas between November 22, 1948 and January 12, 1949. (Tr. p. 30.)

Also, it appears that on January 12, 1949, the said District Court in Arkansas made another Order appointing one R. G. Hines to execute an assignment of

Policy No. 882714 to Ruth Jacoby, plaintiff therein and appellee herein. (Finding XVI, Tr. pp. 29-31.) On January 14, 1949, R. G. Hines executed the assignment, which is set forth fully in Finding XVII. (Tr. pp. 31-32.) Copies of the Judgment, Orders and Assignment were received by appellant on January 25, 1949. (Finding XVIII, Tr. p. 33.) The assignment executed by the said R. G. Hines did not change the beneficiary (Tr. p. 32) and Betty M. Jacoby is still the beneficiary of the policy. (Conclusions II and III, Tr. p. 34.)

Ruth Jacoby brought this action in the United States District Court in California for a declaration, *inter alia,* that she is entitled to obtain the cash surrender value of the policy without the surrender of the policy. (Tr. p. 6.)

Said Policy No. 882714 has never been surrendered to the appellant for any cash surrender value. Appellee does not have possession of the policy and does not know where it is. The insured was the last person known to have possession of it. His whereabouts are unknown. There is no evidence that he cannot surrender the policy. There is no evidence that the policy has been lost, destroyed or stolen. See Finding XIX, Tr. p. 33.

All of those facts were found by the Court below, and said Court also concluded that the "cash surrender value may be obtained by plaintiff Ruth Jacoby upon compliance with the terms and conditions of said Policy No. 882714." (Conclusion IV, Tr. pp. 34-

35.) On November 10, 1950, the said District Court rendered a Declaratory Judgment (Tr. pp. 36-37) wherein said Court held that the "cash surrender value may be obtained by plaintiff Ruth Jacoby upon compliance with the terms and conditions of said Policy No. 882714, *other than the physical surrender of the policy.*" See Tr. p. 37—last sentence in the next to the last paragraph. Emphasis added.

This appeal is from the Declaratory Judgment upon the ground that the judgment is contrary to and not supported by the Findings of Fact and Conclusions of Law.

SPECIFICATION OF ERRORS RELIED UPON.

The only error specified by appellant is that the part of the Declaratory Judgment which holds that appellee Ruth Jacoby may obtain the cash surrender value of the extended term insurance under appellant's Policy No. 882714 without the physical surrender of said policy to appellant is contrary to and not supported by the Findings of Fact and Conclusions of Law.

Specifically, said portion of the Declaratory Judgment is contrary to and not supported by Findings of Fact III to XIX, inclusive, and Conclusions of Law I to V, inclusive, because under said Findings and Conclusions an assignee of the policy is not entitled to receive from the insurer any cash surrender value until the policy itself has been surrendered to the insurer.

A CONCISE ARGUMENT OF THE CASE.

(a) SUMMARY.

The argument is summarized as follows:

(1) The word "surrender" means to "yield up" or "deliver" and has the same meaning in an insurance policy.

(2) The surrender of the policy to the insurer is a condition precedent to the payment by the insurer of the cash surrender value.

(3) An assignee of a contract of insurance, like the assignee of any other contract, does not acquire a greater right or interest than was possessed by the assignor.

(4) There are no special circumstances in this case creating an exception to the rule that surrender of the policy to the insurer is a condition precedent to the payment of the cash surrender value.

(b) COMMENT ON CALIFORNIA LAW.

Our research has not disclosed any reported case of any court of the State of California deciding the precise question involved.

(c) ARGUMENT OF THE CASE.

Following is the argument on the points set forth in paragraph (a) above in their chronological order:

(1) The word "surrender" means to "yield up" or "deliver" and has the same meaning in an insurance policy.

The use of the word "surrender" is not confined to insurance policies alone. It is a word which has a generally accepted meaning. Webster's New International Dictionary, Second Edition, defines "surrender" as follows: "To yield to the power or possession of another; to give or deliver up possession of (anything) * * * to render back; to give in return; to tender." The word "surrender" has the generally recognized meaning of "deliver up" and "deliver possession" of the instrument or document itself in financial transactions involving such things as promissory notes (10 C.J.S. 1005, Bills and Notes, Sec. 465) and mortgages (59 C.J.S. 735, Mortgages, Sec. 469).

In Words and Phrases, Permanent Edition, under "Surrender," many examples are found wherein "surrender" means to yield, render, deliver up and hand over.

When "surrender" is used in insurance policies it still retains its customary and generally accepted meaning.

In *Goodhue v. Hartford Fire Ins. Co.,* 175 Mass. 187, 55 N.E. 1039, the word "surrender" was used in a fire insurance contract and the Massachusetts Court held " 'Surrender' plainly means only a handing over of the document."

Similarly, when the word "surrender" is used in a life insurance contract, it is given its plain, usual

and customary meaning. In *Wells v. Vermont Life Ins. Co.,* 28 Ind. App. 620, 63 N.E. 578, it was held "To 'surrender' means to cancel or yield up."

In a New York case the plaintiff insured sought to force the insurer to pay him the cash surrender value of his policy. He did not have the policy. The Court refused to require the insurer to pay the cash surrender value without the surrender of the policy and held:

> "Cash surrender means cash on surrender. The admission by plaintiff that he cannot surrender the policy and receipt book or show loss or destruction, as required by the policy, because they are in the possession of his wife in Florida, who refuses surrender, entitled defendant to dismissal of plaintiff's complaint."
>
> *Evans v. Metropolitan Life Ins. Co.,* 33 N.Y.S. (2d) 19, at 20.

(2) The surrender of the policy to the insurer is a condition precedent to the payment by the insurer of the cash surrender value.

The cases uniformly hold that the physical surrender of the policy to the insurer is a condition precedent to the payment of the cash surrender value.

Kothe v. Phoenix Mutual Life Ins. Co., 269 Mass. 148, 168 N.E. 737;

Martin v. New York Life Ins. Co., 104 Fed. (2d) 573;

U. S. v. Mass. Mutual Life Ins. Co., 127 Fed. (2d) 880;

U. S. v. Metropolitan Life Ins. Co., 41 Fed. Supp. 91;

Evans v. Metropolitan Life Ins. Co., supra;
Bethards v. Metropolitan Life Ins. Co., 287 Ill. App. 7, 4 N.E. (2d) 257.

Most of the above cases are concerned with situations where an assignee (pursuant to an assignment executed by a court-appointed agent), a trustee in bankruptcy, the Collector of Internal Revenue, or a judgment creditor of the insured, seeks to obtain the cash surrender value of the policy but is unable to physically surrender the policy to the insurer. The courts uniformly hold that the contractual right of the insurer to receive surrender of the policies as a condition precedent to the paying of cash values of policies is not a mere formal requirement but affords substantial protection of the insurer's interests.

Under the policy involved in this case there is a cash surrender value even after it commences running on extended term. The applicable provisions concerning surrender are included in the Non-Forfeiture Provisions set forth fully in Finding IX, Tr. pp. 22-24. An examination of those provisions discloses the policy provides that after three full years' premiums have been paid the "Policy may be surrendered to the Company at its Home Office" within certain time limits for "(A) Its Cash Surrender Value * * * Or, (B) A Paid Up Participating Policy * * *" but "If the Policy be not surrendered for cash or paid up, as above provided * * * and upon default in payment of any premium the insurance will be automatically extended * * *" and "The extended insurance * * *

*may be surrendered at any time for a cash value equal to the full reserve thereon at the time of surrender * * *"* (Emphasis added.) Thus, it is quite plain that whereas before the policy goes on extended term the surrender may be made only at certain times, nevertheless, after it goes on extended term it *"may be surrendered at any time."* Obviously, although running on an extended term, it is the same policy with the same requirement of *surrender for cash value* at the time of surrender except that the surrender may be made *"at any time."*

The case of *Kothe v. Phoenix Mutual Life Ins. Co.,* supra, is particularly worthy of special mention here because the plaintiff there, before bringing suit against the Phoenix Mutual, had brought a creditor's bill in another court to reach the assets of the insured. In that proceeding the Court established the amount of the insured's indebtedness to the plaintiff and appointed a special master to sell all the right, title and interest of the insured in a life insurance policy and to deliver an assignment to the purchaser. The master did sell and he executed an assignment of the policy to the plaintiff. The insurer was notified of the assignment. On the basis of that assignment the plaintiff sued the insurer for the cash surrender value of the policy. The defense was simply that the policy was not surrendered. The Court held the defense was good. The Court also held that "The circumstance that the insured debtor has absconded will not justify us in holding that the defendant cannot rely on the terms of this contract." The policy involved in that

case provided "*At any time* after the premiums for two years have been paid the Company will purchase this policy for its *cash value on* * * * *surrender* at the Home Office * * *" (Emphasis added.)

The *Kothe* case so closely approaches the lawyers' ideal of the "case in point" that we could not refrain from placing it first among the above cited cases, and trust that this Court will not in any way construe that to be in derogation of the force of the opinions in the Federal and other cases cited thereafter.

(3) An assignee of a contract of insurance, like the assignee of any other contract, does not acquire a greater right or interest than was possessed by the assignor.

It is a well settled rule that the assignee of a contract does not acquire other or greater rights than the assignor possessed and takes the contract subject to all the conditions thereof.

Western Oil and Refining Co. v. Venago Oil Corp., 218 Cal. 733, 24 Pac. (2d) 971;
3 Cal. Jur. 277, 292, Assignments, Secs. 31, 41.

The same rule applies to the assignee of a life insurance contract.

Kothe v. Phoenix Mutual Life Ins. Co., supra;
General Am. L. Ins. Co. v. Omaha Nat. Bank, 134 Neb. 698, 279 N.W. 310;
37 C.J. 435, Life Insurance, Sec. 145.

(4) There are no special circumstances in this case creating an exception to the rule that surrender of the policy to the insurer is a condition precedent to the payment of the cash surrender value.

In the opinions in some of the cases cited in (c) (2) above, there appear, as dicta, statements to the effect that in certain situations a party may seek to be excused from complying with the condition precedent of surrendering the policy.

None of those situations exists here. The findings are explicitly to the contrary. In Finding XIX (Tr. p. 33) the Court found, among other things, that there is no evidence that the policy has been lost, destroyed or stolen, and that there is no evidence that Lionel A. Jacoby (the insured) cannot surrender the policy. It is not sufficient that plaintiff relies upon the fact that the whereabouts of the insured are unknown (*Kothe v. Phoenix Mutual Life Ins. Co.,* supra), or that someone else has the policy and refuses to give it up (*Evans v. Metropolitan Life Ins. Co.,* supra) or that the plaintiff never had possession of the policy (*Kothe v. Phoenix Mutual Life Ins. Co.,* supra).

The dictum in *Martin v. New York Life Ins. Co.,* supra, does not apply here because there the Court said "It is not sufficient * * * that the plaintiff makes a showing that it is impossible to surrender the policies," but the party must also show that the granting of the relief will not jeopardize the insurer's interest. There are two reasons why this dictum does not apply here. First, as previously pointed out, there is a finding that there is no evidence that it is impossible to

surrender the policy, and second, there is a beneficiary of the policy other than the appellee, and appellant becomes liable to said beneficiary in the amount of $5,000 in the event of the death of the insured.

CONCLUSION.

It is respectfully submitted that the judgment should be reversed in so far as it holds that the "cash surrender value may be obtained by plaintiff Ruth Jacoby upon compliance with the terms and conditions of said policy No. 882714, other than the physical surrender of the policy." The clause "other than the physical surrender of the policy" is the objectionable part and is contrary to and not supported by the Findings of Fact and Conclusions of Law.

Dated, San Francisco, California,
March 26, 1951.

KNIGHT, BOLAND & RIORDAN,
F. ELDRED BOLAND,
BURTON L. WALSH,
Attorneys for Appellant.

No. 12,808

United States Court of Appeals
For the Ninth Circuit

BANKERS LIFE COMPANY (a corporation),

Appellant,

vs.

RUTH JACOBY,

Appellee.

**Appeal from the United States District Court,
Northern District of California,
Southern Division.**

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

BASIS OF JURISDICTION OF THIS ACTION IN THE DISTRICT COURT AND JURISDICTION OF THE UNITED STATES COURT OF APPEALS TO REVIEW THE SAME.

Appellee believes that the statement as to the jurisdiction of the United States Courts in this matter has been properly set forth in appellant's opening brief, and its statement in that regard is therefore adopted herein.

A CONCISE ABSTRACT OR STATEMENT OF THE CASE.

a. The question involved.

With certain additions, appellant's statement of the question involved in this appeal is believed correct and adequate. To point out the necessary additions for a proper understanding of the issue, appellee herewith copies appellant's statement of the issue, inserting the required additions in italics:

> "Where a life insurance policy provides it may be surrendered at any time for its cash surrender value, and the *right, title and interest of both the assured and the beneficiary in the* policy has been assigned to a person by a court-appointed agent of the insured and the named beneficiary, but said assignment has not changed the beneficiary, and said policy is neither lost, destroyed nor stolen but was last known to be in the possession of the insured *who absconded and* whose whereabouts are unknown, and there is no evidence that the insured *if found* cannot surrender the policy, can the assignee obtain the cash surrender value of the policy without the physical surrender of the policy to the insurer?

b. The manner in which the question is raised.

Appellee also wishes to adopt appellant's narration as to the manner in which the question is raised except as herein corrected. On page 4 of Appellant's Opening Brief the following statement is made:

> "The Judgment also ordered Lionel A. Jacoby and Betty Jacoby to apply to the payment of the Judgment the cash value of Bankers Life Policy No. 822714. That was the wrong policy. The correct one is No. 882714. On January 12,

> 1949, the said United States District Court in Arkansas made an Order changing the policy number in its Judgment of November 22, 1948, from 822714 to 882714."

This reference to the Judgment entered by the United States District Court for the District of Arkansas is inaccurate. We quote from the Judgment and Decree of that District Court:

> "That the defendants Lionel A. Jacoby and Betty Jacoby surrender to the plaintiff all their right, title and claim upon the policy of insurance, No. 822714 (later corrected to '882714') issued by the Bankers Life Company of Des Moines, Iowa, and that the cash value of said insurance policy be applied to the payment of the amount herein adjudged to be due the plaintiff;" (Transcript of Record, pp. 26-27.)

The "Absolute Assignment" executed on the 14th day of January, 1949, by a court-appointed agent of Lionel A. Jacoby and Betty Jacoby, assigned to the plaintiff herein all the "right, title and interest in and to contract No. 882714, issued by Bankers Life Company, Des Moines, Iowa," of both Lionel A. Jacoby and Betty Jacoby. (Transcript of Record, p. 31.) Appellant has not at any time challenged the jurisdiction or venue of the United States District Court for the District of Arkansas, before which the insured and the beneficiary made a general appearance.

Based upon the facts, the Trial Court concluuded as follows:

"IV.

"Plaintiff Ruth Jacoby has the power to change the beneficiary of Bankers Life Company's Policy No. 882714 by complying with the provisions of said policy relating to change of beneficiary.

V

"The extended insurance may be surrendered at any time for a cash value equal to the full reserve thereon at the time of surrender less any indebtedness to defendant Bankers Life Company. This cash surrender value may be obtained by plaintiff Ruth Jacoby upon compliance with the terms and conditions of said Policy No. 882714." (Transcript of Record, Conclusions IV and V, pp. 34-35.)

ARGUMENT OF THE CASE.

Appellant stresses its interpretation of the word "surrender" as found in an insurance company contract. (Appellant's Opening Brief, pp. 8-9.)

In the field of insurance the term "surrender" has unquestionably become a word of art. It does not necessarily imply a physical handing over of the policy; the cases uniformly hold that a policy when lost, stolen, or destroyed need not be physically produced. (*Wilcox v. Equitable Life Assur. Soc.,* 173 N.Y. 50, 65 N.E. 857; 124 A.L.R. 1167.)

In re Knight's Estate, 199 P. (2d) 89, defines the word as follows:

> "The term 'cash surrender value' means the cash value, ascertainable by established rules, of a contract of insurance which has been abandoned and given up for cancellation to the insurer by the person having contract right to do so."
>
> *In re Knight's Estate,* 199 P. (2d) 89, 91.

A contract right can of course be abandoned and given up in innumerable ways. A policy clause involved in *Equitable Life Assurance Soc. v. Miller* (1911), 185 F. 98, provided for a cash surrender value payment upon "due surrender of this policy on any anniversary of its register date of issue". Plaintiff, trustee in bankruptcy, standing in the position of the insured, was not held to a physical surrender requirement, the Court pointing out that the company had accepted the policy from the insured after receiving notice of the bankruptcy proceedings and had permitted the insured to make a loan against the policy. It was pointed out that the trustee had acquired all the insured's rights, that the company was not in any way hurt by his inability to deliver the policy physically and that the company is being subjected to double liability merely by its own acts. Consequently, the trustee in bankruptcy was permitted to recover.

In the instant case, Bankers Life Company received notice of the assignment of all rights, titles, and interests of *the insured and the beneficiary* on or about January 25, 1949. (Finding XVIII, Transcript of Record, p. 33.) No claim has been advanced by the insurer that it made any payments to the insured

of the beneficiary prior to said date and no serious contention is made by Bankers Life Company that any person other than Ruth Jacoby asserts any claim to ownership of the policy or may hereafter assert any rights that were not vested in Ruth Jacoby by reason of the court commissioner's assignment.

Of the cases cited by appellant, only one—*Kothe v. Phoenix Mutual Life Ins. Co.,* 269 Mass. 148, 168 N.E. 737—appears closely related to the issue before the Court in the instant case.

In the *Kothe* case, the insured misappropriated funds of plaintiff; the plaintiff secured a civil judgment against the insured, which ordered that unless a certain sum of money is paid, the policy be sold at public auction by a special master. The master assigned the policy to plaintiff who then applied to defendant company for the cash surrender value of the policy. The Court held that the company need not recognize the assignment.

Some of the language used in the Court's opinion seems to lend support to appellant's contention that a physical delivery is required. However, upon examination, this and all other cases examined on this point turn on a very important factor: Could the insurance company be subjected to double liability by recognizing the claim of the assignee?

Thus, in the *Kothe* case, supra, there was a possibility that the insured had made an equitable assignment of his rights before the assignment took place; and the beneficiary was at no time before the Court

and thus had a possible future claim against the insurance company against which it could not be protected.

It must be noted that although the *Kothe* case has been cited in several other cases cited by appellant, it was not therein cited for the proposition that the physical surrender of the policy to the insurer is a condition precedent to the payment by the insurer of the cash surrender value; rather it has been cited for the well-established principle that a garnisheeing creditor has no greater rights against a third party than the debtor would have had.

The case of *Wilcox v. Equitable Life Assur. Soc., supra,* was cited for the proposition that a physical surrender of the policy is unnecessary although made a condition by the policy where the policy was stolen from the party entitled thereto. The Court points out clearly that a court of equity has the power to protect the insurer adequately by ordering the claimant to execute an appropriate release and receipt.

Obviously, in the instant case, the same protection can be afforded Bankers Life Company. An insurance policy, not being negotiable, is merely a memorandum of agreement and without inherent value.

The Judgment and Decree of the United States District Court for the District of Arkansas, dated November 22, 1948 (Transcript of Record, pp. 25-27) divested the defendants of their right, title and claim upon the insurance policy and ordered the defendants to turn over such policy to plaintiff, Ruth Jacoby.

Equity considers done that which the parties have agreed, or the Court has ordered, to be done. Therefore, the assignment executed on January 14, 1949, by the Court-appointed agent, dates back to the Court order.

Beverly v. Blackwood, 102 C. 83, 36 P. 378;
Daggett v. Rankin, 31 C. 321.

> "§ 3529. That which ought to have been done is to be regarded as done, in favor of him to whom, and against him from whom, performance is due."
>
> *Civil Code of California,* Section 3529.

At the time of the Court order, the policy belonged to Betty Jacoby (Finding VII, Transcript of Record, pp. 21-22) and she had not transferred it to anyone else; it was in the possession of Lionel Jacoby.

Bankers Life Company has not asserted that it has received any notice of any subsequent assignment, or any assignment other than the one made to Ruth Jacoby by the Court-appointed agent.

In case Lionel Jacoby and Betty Jacoby did later assign and deliver the policy to another, that other could gain no rights thereby. The rules of priority between assignees are stated in 4 *Am. Jur.,* Assignments, § 107 as follows:

> "Effect of Prior Notice to Debtor of Assignment.—On the question of the effect on the priorities between successive assignees of the fact that the subsequent assignee was the first to give notice of the assignment to the debtor, there are

two clearly defined and irreconcilable rules. According to the weight of authority, the assignee who first gives notice of his claim to the debtor is preferred and has the prior right, regardless of whether his assignment was prior or subsequent in time to that under which other assignees claim, unless he takes a later assignment with notice of the previous one or does not give valuable consideration for his assignment. There is, however, a strong line of authority in support of the rule that, as between assignees of a chose in action by assignment from the same person, the one prior in point of time will be protected, although he has given no notice of his assignment to either the subsequent assignee or the debtor. In these jurisdictions mere priority of notice does not give priority of right, as between successive assignees of a chose in action, but the question is determined under the equitable rule that as between equal equities, the first in time is best in right. This, in substance, subject to certain limitations, is the rule adopted by the American Law Institute.

"Even in a jurisdiction holding that priority is determined by the time of the assignment, and not by notice to the debtor, a debtor who pays or becomes bound to pay a later assignee of the debt is not liable to an earlier assignee who failed to give him notice of the assignment. The debtor is not, however, protected in paying a later assignee, where he had notice of a previous assignment before he made payment, although the later assignee was the first to give notice.

"Where priority is determined by order of notice, the view has been taken that the time of the

receipt of a notice, and not the time of its posting, determines the priority between different assignees.

"As the question under discussion is one of general jurisprudence, the Federal courts are not controlled by the decisions of the highest court of the state wherein they sit."

4 *Am. Jur.,* Assignments, § 107;
Restatement of Contracts, § 173.

In California, it is settled that as between successive assignees of a chose in action, he will have the preference who first gives notice to the debtor.

3 *Cal. Jur.,* Assignments, § 35.

Regardless of whether the majority and federal rule applies (first in time is first in right) or whether the California rule applies (first to give notice is first in right), Ruth Jacoby prevails.

Thus under either theory, no subsequent assignee with possession of the policy could be in a legal position to assert a valid claim against Bankers Life Company.

The sole interest of appellant has been fully protected. The Judgment and Decree made by the United States District Court for the District of Arkansas (Transcript of Record, pp. 25-27) fully adjudicated the rights both of Lionel A. Jacoby, the insured, and Betty Jacoby, the beneficiary. Both were before the Court and subject to the Court's jurisdiction. By its decree the only possible claimants to the policy other than Ruth Jacoby have been permanently and finally

foreclosed of any and all possible legal claim to ownership.

In *Sundstrom v. Sundstrom,* 129 P. (2d) 783, 15 Wash. (2d) 103, the mother and widow of the deceased litigated over the proceeds of an insurance policy issued on the life of the deceased. The policy provided for a change of beneficiary by written notice to the company's home office, "accompanied by the Policy for indorsement of the change thereon by the Company, and unless so indorsed the change shall not take effect." Another provision of the contract provided: "Any assignment of this Policy must be made in duplicate and one copy filed with the Company at its Home Office." The insured separated from his wife and gave proper notice to the company that his mother is to be substituted as the beneficiary. Prior thereto, however, he had made an oral, equitable assignment of the policy to his wife. At page 788 the Court stated:

> "It is true that no formal written assignment of the policy was executed, as required by the provision of the policy hereinabove quoted. But that provision, as we have seen, is designed solely for the protection of the insurance company, and its rights are in no way involved here."
>
> *Sundstrom v. Sundstrom,* 129 P. (2d) 783, 788; 15 Wash. (2d) 103.

The same Court said:

> "The proceeds of the policy, as and when payable, became the property of respondent by virtue

> of the equitable assignment, and the insured had no power or right to divest them from her."
>
> *Sundstrom v. Sundstrom*, 129 P. (2d) 783, 788; 15 Wash. (2d) 103.

A Federal Court decree must have as much force and effect in the instant case as an oral, equitable assignment had in the *Sundstrom* case, *supra.* By that decree Lionel Jacoby and Betty Jacoby have been divested of all power to do any act which might in any way prejudice Bankers Life Company. The *Sundstrom* case further indicates that neither physical possession of the policy nor technical observance of every condition of the policy are necessary, *provided the insurer's interest is protected.*

Blackburn v. Merchants Life Ins. Co., 90 Cal. App. 362, 265 P. 882, clearly establishes that here the insurer does not incur any chance of double liability. There the insured handed his life insurance policy to plaintiff, who was then the insured's wife and the beneficiary named in the policy. The policy remained in her possession. Later, after a divorce of the parties, the insured applied for and obtained the cash surrender value of the policy. After the death of insured, plaintiff sought to enforce the policy in her favor. Denying her claim, the Court said:

> "As this right of surrender was not dependent upon the consent of the beneficiary, the respondent was relieved from all liability under the policy when it paid the insured the full surrender value when it was canceled."
>
> *Blackburn v. Merchants Life Ins. Co.*, 90 Cal. App. 362, 365; 265 P. 882.

That case was decided in this jurisdiction.

The issue and deciding factor in *Evans v. Metropolitan Life Ins. Co.,* 33 N.Y.S. (2d) 19, is pointed out in the following extract:

> "The claim of plaintiff's wife for reimbursement of premium paid by her, which may amount to an equitable right, cannot be arbitrarily rejected or divested by defendant through payment of a cash surrender value to plaintiff on his demand. Cash surrender means cash on surrender. The admission by plaintiff that he cannot surrender the policy and receipt book or show loss or destruction, as required by the policy, because they are in possession of his wife in Florida, who refuses surrender, entitled defendant to dismissal of plaintiff's complaint."
>
> *Evans v. Metropolitan Life Ins. Co.,* 33 N.Y.S. (2d) 19.

Plaintiff's proper remedy would have been to join his wife in the action and procure a judgment, if he was entitled to it, declaring him to be the sole owner of his policy. Without such a decree, the insurance company could not safely make payment. Plaintiff did not prevail, not because he did not have the physical possession of the policy, but because he was not its sole owner.

Appellant cites one case which we believe properly states the law applicable to this case. It is *Martin v. New York Life Ins. Co.,* 104 F. (2d) 573, wherein plaintiff was the trustee in bankruptcy seeking the cash surrender value. The insured was a fugitive from justice and had been adjudicated a bankrupt

upon the filing of an involuntary petition. We quote at length:

> "The contractual right of the insurer to receive surrender of the policy as a condition precedent to the paying of cash values of policies is not a mere formal requirement, but affords substantial protection of the insurer's interests. No doubt circumstances in a particular case might be such that the interests of the insurer could not be jeopardized by failure to receive surrender of a policy; *and if the party entitled to the surrender value could not deliver the policy, a court of equity would not permit him to suffer the loss of his property because of inability to perform an act, the non-performance of which could not harm the insurer. If in the instant case the insured were a party to the suit and if a showing could be made that the policies had been destroyed or for other sufficient reasons could not be surrendered, and that the insurer's interest would not be jeopardized by the payment of the cash value of the policies as of the date of bankruptcy, no doubt the plaintiff trustee would be entitled to a judgment for the cash value without surrender of the policies, or, in the alternative, to a decree requiring issuance of new policies to be surrendered in accordance with the terms thereof.* But the facts are that the insured disappeared sometime before the date of bankruptcy and his whereabouts at all times since his disappearance have been and are unknown. The beneficiary also has disappeared and while it is suspected that she has possession of the policies, such fact cannot be established. If the insured died before the date of bankruptcy, his beneficiary is entitled to payment of the amounts of

the policies. If the policies were assigned by the insured prior to bankruptcy for value and are in the possession of the assignee, the insurers are reasonably certain of being subjected to litigation, if not damages.

"It is not sufficient in the instant case that the plaintiff makes a showing that it is impossible to surrender the policies. The general proposition is well recognized that equity will not require performance of an impossible act, but it does not follow that one who is relieved therefrom can claim all the advantages that go with the performance. He may merely escape burdens or penalties. And when, as in the instant case, a party seeks to be relieved from the performance of a condition precedent to obtaining relief on the ground that it is impossible to perform such condition, such party must also show that the granting of the relief will not jeopardize the legitimate interests of the person entitled to performance of the condition.

"Ordinarily in a suit by a creditor of the insured or by the trustee in bankruptcy to recover the cash value of an insurance policy the beneficiary has no vested interest which must be considered. But in the instant case the trial court could not ignore the fact that the beneficiary does have a vested interest in the policy if the insured was not living at the date of bankruptcy. On that date the policies were all in full force and effect. There had been no default in payment of premiums and the insured had not exercised any of his options under the contract relative to receipt of policy values.

"On appeal our inquiry is whether the District Court, as an equity court, in view of the peculiar

> *facts of the case, was justified in finding a want of equity in plaintiff's demand.* In our opinion the District Court properly concluded that the equities of plaintiff did not justify disregarding the contractual interests of the defendant companies and we hold that the District Court did not err in its decree of dismissal for want of equity." (Italics added.)
>
> *Martin v. New York Life Ins. Co.,* 104 F. (2d) 573, at 574-5.

Since the adjudication in bankruptcy was involuntary and the insured absconded prior thereto, the insurer could not be assured that it would not be subjected to double liability. The Court, it may be noted, was not exercised over the trustee's inability to hand over physical possession of the policies; instead the Court's concern centered over its inability to protect the insurer.

In the instant case before the Court, both the insured and the beneficiary had their day in court; the judgment and decree of the United States District Court in Arkansas is final; the insured did not abscond until *after* its rendition, and *after* the Court obtained jurisdiction over his person, and transferred to Ruth Jacoby all of the right, title and interest of both the assured and the named beneficiary and owner of the policy.

Further, the Court in the *Martin* case, *supra,* making all its other pronouncements *dicta,* stated that the peculiar facts involved justified the trial judge in finding a want of equity in plaintiff's demand.

In the instant case, the Honorable Judge Erskine found the equities to favor plaintiff. It is respectfully submitted that no factor suggests any unwise determination of that question.

Finally, a group of cases cited by appellant concerns creditors of the insured who seek the cash surrender value of the insured's policies without bringing the insured before a Court which might enable the chancellor to direct the insured to assign his rights, or, in the alternative, have a Court-appointed master do it for him.

In *Bethards v. Metropolitan Life Ins. Co.,* 287 Ill. App. 7, 4 N.E. (2d) 257, a judgment creditor sought to collect on the debtor's insurance contract both the cash surrender value and the accrued dividends. The Court awarded the dividends, but not the cash surrender value. The creditor had no assignment, and the Court had no power to protect the insurer from double liability.

Several decisions indicate how a creditor may benefit by an unliquidated equity in an insurance policy. One of them is *U. S. v. Mass. Mutual Life Ins. Co.,* 127 F. (2d) 880, wherein the Government, pursuant to Internal Revenue Code, Section 3710, made demand upon the debtor's insurer for the surrender value of his policy. The contract contained the standard condition of "surrender" of the policy. The Court held that the policy was not subject to distraint. Under the contract clause, the insured had to apply for the

cash surrender value. The Court, stating that this condition is perhaps only a formal one which could be passed over in an equitable case, pointed out that the Government failed to state an equitable set of facts, because neither the insured nor the beneficiary was a party to the action, and although the Government could have forced an assignment of the insured's policy rights, it had not done so, and therefore the possible remaining liability of the insurer could not be overlooked.

> "A court of equity having jurisdiction over the person of the insured might in a proper case command the insured to exercise his power and thus transmute the primary obligation of the insurance company into an obligation to pay over the cash surrender value."
>
> *U. S. v. Mass. Mutual Life Ins. Co.,* 127 F. (2d) 880, at 883.

In the instant case, that deficiency was obviated by the act of the District Court for the District of Arkansas making Ruth Jacoby the assignee of all of the rights of both the insured and the beneficiary.

Of similar effect is *U. S. v. Metropolitan Life Ins. Co.,* 41 Fed. Supp. 91, wherein the Court also suggested that the Government bring the insured before the Court for a proper transfer of his rights; when the Government's demand was made, the insured had no claim against the company as he had not requested the cash surrender value.

"No one here has that power nor any power to compel him to act."

U. S. v. Metropolitan Life Ins. Co., 41 Fed. Supp. 91.

CONCLUSION.

Bankers Life Company has no direct interest in this proceeding other than to be protected from double liability. By means of appropriate proceedings which have become final, the insured and the beneficiary have been divested of any and all right, title and interest either of them had in Policy No. 882714 issued by appellant. Their right, title and interest are now vested in appellee, Ruth Jacoby. Appellant has not suggested, and cannot suggest, on what basis any person or persons other than Ruth Jacoby can make a claim against Bankers Life Company on their policy No. 882714, which would not be completely and finally defended by a receipt and release given to it by Ruth Jacoby.

Appellant relies solely on the technicality of appellee's inability to surrender the physical possession of the policy. Yet every time a case cited by appellee involved that point, there the insurer could not be adequately protected by the Court against a possible subsequent claim. Here the insurance company is fully protected.

Should appellee be denied the right to recover the cash surrender value of the policy at issue, since no

one else now has a claim to this policy, the insurer would be able to escape all liability as long as the policy itself remains hidden from the eyes of appellee.

Such a result is unconscionable; the equities are clearly against appellant and the judgment of the District Court should be affirmed.

Dated, Berkeley, California,
April 23, 1951.

Respectfully submitted,
FRANCIS T. CORNISH,
Attorney for Appellee.

No. 12,808

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vs.

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APPELLANT'S CLOSING BRIEF.

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APPELLANT'S CLOSING BRIEF.

THE ARKANSAS PROCEEDINGS ARE NOT BINDING ON APPELLANT.

Not being a party, the Arkansas proceedings are not binding on the appellant.

Harrisberry v. Lee, 311 U.S. 32, 85 L. Ed. 22;
50 *C.J.S.* 288, 385;
34 *C.J.* 974, 1046, 1050.

The foregoing principle was specifically applied by the Supreme Court of Arkansas to life insurance policies in the case of *Pedron v. Olds,* 193 Ark. 1026, 105 S.W. (2d) 70. In that case two separate parties claimed to be beneficiaries under two policies of life insurance. One set of beneficiaries brought suit

against the other beneficiaries in replevin seeking to recover the policies in which it was claimed that the first set of beneficiaries were the owners and entitled to possession thereof. Neither insurance company was made a party to the litigation. The Court determined that the one set of beneficiaries was entitled to the possession of the policy and concluded by saying:

> *"The insurer would not pay the beneficiary without the surrender of the policy or some evidence of its loss or destruction,* and we do not apprehend that any court would require the insurer to pay the proceeds of the policy under the testamentary provision of the insured after payment had been made to the designated beneficiary and the policy surrendered. There are numerous cases holding that a policy may be assigned by the insured without the consent of the beneficiary, where there is no vested interest in the beneficiary, and, if the insured quits paying the premiums and the policy lapses, the beneficiary loses his interest therein along with the insured, and we can perceive no valid reason why, under similar conditions, a testamentary provision may not have the effect of changing the beneficiary. In the case before us, the beneficiary had no vested interest during the lifetime of the insured and neither did the legatee under the will. Both provisions became effective on his death. The provision in the will conflicted with the provision in the policy designating appellant as beneficiary, and, this being the insured's last expression on the subject, it ought to control.
>
> *"Neither insurance company is a party to this litigation. So far as this record discloses, no proof of death has ever been made, and, of course,*

what we have here said is not conclusive as against the insurance companies, as only the rights of the parties to this litigation are here decided." (Emphasis ours.)

BETTY M. JACOBY IS THE BENEFICIARY OF THE POLICY AND ENTITLED TO THE DEATH BENEFITS UPON THE DEATH OF JACOBY.

Further, the Court in Arkansas did not change the designation of Betty M. Jacoby as beneficiary of the policy. (Finding XVII, Tr. p. 32.) The Conclusions of Law (III, Tr. p. 34) state:

> "Betty M. Jacoby is the beneficiary of the extended term insurance upon the life of Lionel A. Jacoby as provided in defendant Bankers Life Company's Policy No. 882714."

Therefore, if Lionel A. Jacoby should be now dead or if he should die before the actual and legal surrender of the policy as therein provided, Betty M. Jacoby is *ipso facto* entitled to the death benefits of the policy.

CONCLUSION.

Finally, appellee invokes the equities; but he who asks equity must do equity. The record is barren of evidence of any attempt upon the part of appellee to find Lionel A. Jacoby or Betty M. Jacoby or in any manner to secure the possession of the policy.

Finding XIX (Tr. p. 33) states, "The whereabouts of Lionel A. Jacoby are unknown." But have they al-

ways been unknown? Appellee found him once in Arkansas. Perhaps she could find him again if she made an effort. Certainly equity demands that she should try.

It is respectfully submitted the judgment should be reversed.

Dated, San Francisco, California,
May 2, 1951.

KNIGHT, BOLAND & RIORDAN,
F. ELDRED BOLAND,
BURTON L. WALSH,
Attorneys for Appellant.

No. 12809

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GERALD G. BOYDEN,

Petitioner-Appellant,

vs.

P. J. SQUIER, Warden,
United States Penitentiary,
McNeil Island, Washington,

Respondent-Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF OF APPELLEE

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OFFICE AND POST OFFICE ADDRESS:
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TACOMA 2, WASHINGTON

BALLARD NEWS, SEATTLE, WASHINGTON -- 1/26/51 -- 45 COPIES

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No. 12809

IN THE

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GERALD G. BOYDEN,

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UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF OF APPELLEE

QUESTIONS INVOLVED

1. Does the indictment herein in charging appellant and another person with the transportation under the Dyer Act of a single automobile allege an impossible offense, in view of its operation requiring but one person?

2. Is the statute which provides that prosecution for an offense such as under the Dyer Act may be had in the district in which the offense was begun, or continued, unconstitutional, rendering the trial court without jurisdiction and the proceedings therein against appellant and any other so tried invalid and the sentence of each void?

STATEMENT

On January 25, 1950, an indictment containing a single count was returned against Gerald Glenn Boyden, the appellant herein, and another in the Southern Division of the United States District Court for the Southern District of California, which charged the two with the transportation of a stolen automobile from San Diego County, California, to Tiajuana, Baja, California, Mexico, contrary to Title 18 U. S. Code, Section 2312. (R. 1-2). Thereafter, on March 17, 1950, appellant was sentenced to a term of eighteen months imprisonment after trial by jury and conviction of said offense, he being represented by counsel at all proceedings therein, and following which appellant was received at McNeil Island Penitentiary on March 30, 1950, and will be eligible for conditional release on May 31, 1951. (R. 28-32).

The appellant has not been reluctant in accepting the opportunities afforded him to explore grounds

whereby release might be sought. In this connection, appellant has made a motion in the trial court to vacate his sentence and upon its denial has appealed to this court, and this court has since the commencement of these proceedings denied his appeal on the motion and previously denied his application for transcript of the record. (R. 23, 30).

Boyden v. Smith, 183 F. (2d) 189.

In addition to the foregoing, appellant's prior petition for writ of habeas corpus to the District Court was dismissed upon his own motion, (R. 4), and the appellant thereafter, by petition for writ of habeas corpus and pauper affidavit received by the Clerk of the court on September 25, 1950, applied to the Honorable William Denman, Chief Judge of the United States Court of Appeals for the Ninth Circuit, for release from imprisonment, upon grounds as contended for herein, (R. 10-17), which application by judicial order was duly transferred to the United States District Court for the Western District of Washington, and filed therein November 1, 1950. (R. 18).

The appellant lodged his present application for writ of habeas corpus and motion for leave to proceed in forma pauperis on October 27, 1950, with the District Court, (R. 3-9), and appellee was thereupon

ordered to show cause on November 16, 1950, of the detention of appellant. (R. 19-20).

To the order to show cause, appellee filed his response on November 21, 1950 (R. 21-25), and produced in court the body of the appellant at the time to which said return and hearing was continued on November 27, 1950. (R. 28).

The appellant at the time of hearing made oral traverse to appellee's return and confined the issue to the questions hereinbefore stated, (R. 30), whereupon the District Court, after full consideration, (R. 28-32), entered its order denying the application and dismissing the action. (R. 33-34). From that final order appellant has been permitted to appeal in forma pauperis, (R. 26-27, 42-47), and to file as a part of the record herein his Supplementary Brief in support of habeas corpus application. (R. 35-41, 48).

ARGUMENT

I.

THE INDICTMENT IN CHARGING APPELLANT AND ANOTHER WITH THE TRANSPORTATION UNDER THE DYER ACT OF A SINGLE AUTOMOBILE DOES NOT ALLEGE AN IMPOSSIBLE OFFENSE, OR AN OFFENSE CAPABLE OF BEING COMMITTED BY BUT ONE PERSON.

The evidence of transportation of stolen automobiles in interstate or foreign commerce is not confined to the question of who operated the motor vehicle across the state line or border, as appellant would have the court consider in support of his contention that such offense is capable of being committed by but one person, and that any other person in any wise involved should be charged with conspiracy.

By Section 2312, Title 18, U. S. Code, it is provided:

> "Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

The indictment drawn under the preceding statute charged:

> "On or about January 7, 1950, defendants Gerald Glenn Boyden and George Louis Thompson did transport and cause to be transported a certain stolen motor vehicle, namely: a 1947 Dodge sedan, motor number D24-320635, from San Diego County, California, within the Southern Division of the Southern District of California, to Tiajuana, Baja, California, Mexico; and the defendants then knew the motor vehicle to have been stolen."

Appellant finds further fault (R. 35) with the indictment because of the additional words, to-wit, "and cause to be transported". These words, while they may be considered unnecessary in view of the definition of "principal" in Section 2 of this title and hereinafter cited, do not refer to the method or means of transportation, as appellant contends, nor do they render the language inconsistent. (R. 35, 44).

Accordingly, the statute is as broad as formerly when the Court of Appeals for the Eighth Circuit in *Hagan v. U. S.*, 9 F. (2d) 562, 563 held:

> "This language is sufficiently broad to cover movement either under its own power or where the automobile was carried as freight. A particularization in this respect was not important to the statement of the offense and, therefore, cannot be urged against the sufficiency of the indictment, although a statement of the character of such transportation might have been made more particular had defendant sought to have this done by a bill of particulars."

The decision of the same circuit in the later case

of *Carpenter v. U. S.*, 113 F. (2d) 692 is to the same effect, where the court at page 693 observed:

> "On this appeal we give consideration first to the judgment of conviction upon the first count of the indictment. That count charged the several defendants with violation of 18 U.S.C.A. Section 408 (now 2312), which denounces the interstate (or foreign) transportation of a stolen motor vehicle, knowing the same to have been stolen. The count did not specify the particular part taken by each defendant in the stealing and transportation of the vehicle, but all were indicted as principals who aided and abetted in the commission of the offense."

And the court concluded at page 698 as follows:

> "The proof of guilt on the part of each of the defendants as to the first count of the indictment was in all respects sufficient and their trial having been fair, impartial and without prejudicial error, no grounds for reversal of the conviction on that count has been shown."

The offense it has been held consists of transporting in interstate or foreign commerce, not in the completed journey, from one state or country to another.

United States v. Winkler, 299 F. 832.

This being true, one who transports a stolen car from one state into another and returns to original state has violated the statute.

Hughes v. U. S., 4 F. (2d) 387, cert. den. 268 U. S. 692.

A similar situation is presented where it is held that every carrier who transports goods through any part of a continuous passage in the state to a point in another state is engaged in interstate commerce, whether the goods are carried upon through bills of lading or rebilled by the several carriers.

> *U. S. v. Colorado & N. W. R. Co.*, 157 F. 321, cert. den. 209 U. S. 544.

In the case of *U. S. v. Lento*, 78 F. Supp., 374 the District Court, at page 375 observed:

> "Defendant has filed motions for judgment of acquittal and for a new trial. The former motion is pressed with regard to Counts II, III and V, which dealt with the automobiles described above which defendant did not actually drive across a state line. Defendant's contention is that there is insufficient evidence to support a conviction for transportation of the vehicles involved. However, I feel that the evidence justifies a conclusion that defendant aided and abetted her co-defendants in the transportation of the stolen cars across state lines. Cf. *Backun v. United States*, 4 Cir., 112 F. (2d) 635; *United States v. Harrison*, 3 Cir., 121 F. (2d) 930; *United States v. DiRe*, 2 Cir., 159 F. (2d) 818; *United States v. Pecoraro*, 2 Cir., 115 F. (2d) 245; See *Direct Sales Co. v. United States*, 319 U.S. 703, 713, 63 S. Ct. 1265, 87 L. Ed. 1674. Accordingly, therefore, under 18 U.S.C.A., Sec. 550 it was proper to indict, try, and convict her as a principal. Cf. *United States v. Pritchard*, D.C., 55 F. Supp. 201; *United States v. Rappy*, 2 Cir., 157 F. (2d) 964."

On appeal from a conviction of two defendants

after trial by jury in which each defendant blamed his co-defendant and tried to absolve himself from criminality, the opinion of the Court of Appeals, 8th Circuit, in the case of *Isbell v. United States*, 26 F. (2d) 24, and in the language of the headnote 3, as to the indictment, was as follows:

> "Indictment charging that defendants, in Washita County in the Western District of Oklahoma, did then and there knowingly, willingly, unlawfully, and feloniously transport in interstate commerce from Wichita, in the State of Kansas, into Western District of Oklahoma, a certain Buick automobile, giving the number thereof, knowing said motor vehicle to have been stolen, held sufficient to charge violation of National Motor Vehicle Theft Act (18 U.S.C.A. Section 408)".

In addition, Title 18 U. S. Code, Section 2, supports respondent's position in that it states:

> "(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.
>
> (b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such."

On habeas corpus, however, the question is not whether indictment is vulnerable to direct attack, but whether it is so fatally defective as to deprive the court of jurisdiction.

Garrison v. Hudspeth, 108 F. (2d) 733;
Farnsworth v. Zerbst, 98 F. (2d) 541.

In paragraph III of his Supplementary Brief (R. 37), appellant in effect contends that his conviction is not supported by evidence.

As stated in *Casebeer v. Hudspeth*, 121 F. (2d) 914, and 916, appellant is limited in habeas corpus proceedings, by the following rule:

> "It is the general rule that the sufficiency of the evidence to warrant a conviction in a criminal case can be reviewed only on appeal and that it cannot be tested in habeas corpus to effect the discharge of the accused from confinement after conviction but in such a proceeding the sufficiency of the evidence in the criminal case must be conclusively presumed."

See *Gillenwaters v. Biddle*, 18 F. (2d) 206.

Whether the indictment states an offense must be determined from the instrument itself, and not from the testimony nor the conjecture of the appellant.

Minnec v. Hudspeth, 123 F. (2d) 444.

And on habeas corpus unless it appears on the face of the indictment that an impossible or colorless offense has been charged, the indictment must stand.

Rosenhoover v. Hudspeth, 112 F. (2d) 667.

II.

THE STATUTE WHICH PROVIDES THAT PROSECUTION FOR AN OFFENSE SUCH AS UNDER THE DYER ACT MAY BE HAD IN THE DISTRICT IN WHICH THE OFFENSE WAS BEGUN OR CONTINUED IS NOT UNCONSTITUTIONAL, AND PROSECUTION HEREIN PURSUANT THERETO DID NOT RENDER THE TRIAL COURT WITHOUT JURISDICTION NOR THE PROCEEDINGS AGAINST APPELLANT OR HIS CO-DEFENDANT INVALID OR THEIR SENTENCES VOID.

Section 3237, Title 18, U. S. Code, provides:

> "Except as otherwise provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued or completed."
>
> "Any offense involving the use of mails or transportation in interstate or foreign commerce is a continuing offense and except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves."

Appellant's chief difficulty in accepting the above statute as law lies in the fact that he cannot conceive of a crime being committed in more than one district or state. There is nothing in the lan-

guage of Article III, Section 2, Clause 3, or of Amendment VI of the United States Constitution which supports the view that the commission of a crime is limited to one district. That would be a choice that such offender has so far refused to observe.

Appellant's claim that he was not present in the district at the time does not establish that he did not commit the offense there, nor that the trial court did not have jurisdiction to try him.

See *McBoyle v. United States*, 43 F. (2d) 273, and Supreme Court cases there cited.

See also *Ventimiglia v. Aderhold*, 51 F. (2d) 308.

In *Penny v. United States*, 154 F. (2d) 629, where the ground of the motion to vacate the sentence was that no federal offense had been committed until the stolen automobile had been driven from Virginia into West Virginia and therefore no crime was ever committed in the Eastern District of Virginia, the Court of Appeals, Fourth Circuit, held prosecution in the Eastern District of Virginia was valid and the motion lacking in merit. Such a provision, it was pointed out, has prototypes in many other federal criminal statutes and is clearly valid.

See *Armour Packing Co. v. United States*, 209 U. S. 56, and cases therein cited.

Simmons v. Zerbst, 18 F. Supp. 929 and cases cited.

CONCLUSION

The appellee, therefore, contends that for the foregoing reasons, the decision of the District Court should be affirmed.

Respectfully submitted,

J. CHARLES DENNIS,
United States Attorney

GUY A. B. DOVELL,
Assistant United States Attorney

Attorneys for Appellee.

No. 12810

IN THE

United States
Court of Appeals

FOR THE NINTH CIRCUIT

F. E. NEMEC,
Appellant,

UNITED STATES OF AMERICA,
Appellee.

No. 12810

On Appeal from the District Court of the United States, for the Eastern District of Washington

BRIEF FOR THE APPELLEE

HARVEY ERICKSON,
United States Attorney

FRANK R. FREEMAN,
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Attorneys for Appellee

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No. 12810

IN THE

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FOR THE NINTH CIRCUIT

F. E. NEMEC,
Appellant,

UNITED STATES OF AMERICA,
Appellee.

No. 12810

On Appeal from the District Court of the United States, for the Eastern District of Washington

BRIEF FOR THE APPELLEE

STATEMENT OF JURISDICTION

The Circuit Court of Appeals has jurisdiction of the instant case under the provisions of Title 28, Sections 1291 and 2255, United States Code.

STATEMENT OF THE CASE

On or about July 2, 1948, the appellant, F. E. Nemec, was convicted by jury in the District Court of the United States for the Eastern District of Washington, Northern Division, on four counts of criminal violations against the United States. The gist of the counts was that the appellant Nemec, and others, had de-

frauded numerous Washington investors by the sale of mining claims in California through false and fraudulent representations and promises.

Appellant Nemec was sentenced on July 2, 1948, to a term of two years on Count I, the conspiracy count; a term of one year on Count II, the mail fraud count; a term of one year on Count IV, a Securities and Exchange Act count; and a term of one year on Count V, a Securities and Exchange Act count; imprisonment on Counts I, II, and IV to run consecutively—a total of four years; imprisonment on Count V to run concurrently with the sentences on the other counts. Count III was dismissed by the Court during the trial and is not involved in this appeal.

Appellant Nemec appealed his conviction to the United States Circuit Court of Appeals for the Ninth Circuit. By opinion dated December 14, 1949, in case No. 11975, the Circuit Court affirmed his conviction. The opinion of the Court is reported in 178 F. (2d) 656, No. 4. Petition for certiorari to the United States Supreme Court was denied on June 5, 1950.

On the 9th day of October, 1950, the appellant filed with the Clerk of the District Court for the Eastern Disrict of Washington, a Motion to Vacate Judgment and Sentence (Tr. 14). This motion was denied by the Court on December 9, 1950 (Tr. 27). It is from this order denying said motion that the present appeal is taken.

APPELLANT NEMEC'S ASSIGNMENTS OF ERROR

Appellant sets forth several assignments of error predicated upon the refusal of the trial court to grant his Motion to Vacate Judgment and Sentence. The trial court considered and rejected the several contentions made by the appellant in his motion. These sev-

eral contentions have been designated by appellant as his assignments of error and, together with the argument of appellee, are:

ARGUMENT

1. Answer to appellant Nemec's assignment of error, viz., that the indictment here involved did not sufficiently charge the commission of an offense, or offenses.

Appellant, before trial, interposed a demurrer to the indictment with which he was charged. One of the grounds of that demurrer was that the indictment did not charge the commission of an offense, or offenses. The demurrer was formally overruled by the District Judge. The appellant did not challenge the sufficiency of the indictment in his appeal to the Circuit Court on the judgment and conviction, nor did he allege error in his appeal based upon the overruled demurrer. Appellant was at all times during the trial, and afterwards on appeal, represented by able counsel. Since the sufficiency of the indictment was not earlier challenged on the original appeal to the Circuit Court, appellee believes that the Circuit Court should decline to consider it now. It is the position of the appellee herein that the indictment constituted a full and sufficient charge of the alleged crimes therein contained and that appellant's failure to challenge the indictment on his appeal from this conviction is proof of that sufficiency.

2. Answer to appellant Nemec's assignment of error, viz., that he was twice convicted and sentenced on the same offense, inasmuch as the conspiracy count and the substantive counts of the indictment alleged substantially the same offense and intent and were supported by the same evidence.

It has been well established that conspiracy is a crime separate from substantive crimes and may be prosecuted with the latter. *United States v. Freeman,* 167 F. (2d) 786. The conspiracy count covered the period from January 1, 1945, to the date of the indictment, May 6, 1948, and all of the substantive counts were alleged to have been committed within that period. It is the position of the appellee that these substantive counts were committed in furtherance of the continuing conspiracy, and, therefore, the same evidence could be used to support both. *Nye & Nisson v. United States,* 168 F. (2d) 846. Therefore, the appellant's contention that the various counts were improperly supported by the same evidence has no weight. See also *Pinkerton v. United States,* 328 U. S. 640.

The contention of the appellant that he has been tried, convicted and sentenced twice on the same offense, inasmuch as the conspiracy count and substantive counts of the indictment allege substantially the same offense, is well answered in *Pinkerton v. United States, supra,* at page 643, wherein it was stated:

> "It has been long and consistently recognized by the court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. The power of Congress to separate the two and to affix to each a different penalty is well established."

A conviction for the conspiracy may be had, though the substantive offense was completed. *Heike v. United States,* 227 U. S. 131, 144. And the plea of double jeopardy is no defense to a conviction for both offenses. *Carter v. McClaughry,* 183 U. S. 365, 395. Moreover, it is not material that overt acts charged in the conspiracy counts were also charged and proved as substantive counts. As stated in *Sneed v. United States,* 298 Fed. 911 at 913:

> "If the overt act be the offense which was the object of the conspiracy, and is also punished, there is not a double punishment of it."

In *Holmes v. United States,* 134 F. (2d) 125, cert. den., 319 U. S. 776, the court pointed out that a defendant could not complain of a conviction of violating a Securities Exchange Act and of using the mails to defraud, embraced in several counts, and of conspiracy to effect the scheme to defraud embodied in such counts, on grounds that through the conspiracy count he was twice convicted of the same offense, since conspiracy was a different offense from that charged in the other counts.

The several citations of authority submitted by the appellant on this point in his brief have been examined with care and are not in point. So far as the appellee has been able to determine, there is no conflict of opinion among the courts as to the application of double jeopardy, based on these counts, as would give the appellant aid or comfort.

> 3. Answer to appellant Nemec's assignment of error that Substantive Counts II and IV of the indictment were defective in that said counts failed to allege where the letters therein contained were posted.

Count II of the indictment, a mail fraud count, charged in part:

> "That on the 13th day of December, 1945, in the Southern Division of the Eastern District of Washington, and within the jurisdiction of this court the defendants, F. E. NEMEC and BONEWICZ X. DAWSON, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, caused to be sent and delivered, according to the directions thereon, by the Post Office establishment of the United States, a letter ad-

dressed to Mr. Henry L. Harris, 921 Snow, Richland, Washington."

Count IV, a Securities and Exchange count, charged in part:

> "The said defendants on or about the 9th day of November, 1946, in the Southern Division of the Eastern District of Washington, and within the jurisdiction of this court, did cause to be delivered by the mails of the United States, according to the directions thereon, a certain letter addressed to Robert L. and Catherine U. Alderson, Route No. 8, Yakima, Washington; the said letter having theretofore on or about the 8th day of November, 1946, been placed or caused to be placed by the said defendants in an authorized depository for mail matter to be sent or delivered by the Post Office establishment of the United States according to the directions thereon."

The letter involved in Count II was admitted as plaintiff's Exhibit No. 49, and the addressee, Henry L. Harris, testified as to his receipt of same through the United States mails at Richland, Washington, within the Eastern District of Washington, on or about the date alleged in the indictment. The letter involved in Count IV constituted plaintiff's Exhibit No. 63, and the addressee, Robert L. Alderson, testified to its receipt through the United States mails at Yakima, Washington, within the Eastern District of Washington, on or about the date alleged in the indictment.

The crux of appellant's contention appears to be that the mailings on which these counts are based were defective in that the letters were not posted within the Eastern District of Washingon.

The material part of Section 338, Title 18 of the Criminal Code on which the above counts were based reads in substance as follows:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, . . . shall, for the purpose of executing such scheme or artifice . . . place, or cause to be placed, any letter . . . in any postoffice, . . . or authorized depository for mail matter, to be sent or delivered, . . . *or shall knowingly cause to be delivered by mail according to the direction thereon* . . . any such letter, . . . shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both."

It is patently apparent from the above that Congress plainly intended that the district within which the letter was caused to be delivered according to the directions thereon would have jurisdiction under the above section. The indictment, as to these two counts, followed the wording of the statute in this regard.

The contention of the appellant is disposed of in *Salinger v. Loisell,* 265 U. S. 224, 234, where the precise point upon which appellant relies was directly answered by the United States Supreme Court. In the above case the court held unequivocally that the government could prosecute for the unlawful use of the mails to perpetrate a scheme ~~of~~ artifice, either in the District where the letter was mailed or in the District where the letter, according to its address, was delivered.

CONCLUSION

Appellee respectfully urges that the trial court committed no error in denying appellant's Motion to Vacate Judgment and Sentence, and appellee respectfully urges that the petition of appellant Nemec herein be denied.

Respectfully submitted,

HARVEY ERICKSON,
United States Attorney

FRANK R. FREEMAN,
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Attorneys for Appellee

No. 12811

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate of Juvenile Products of Pasadena, a Corporation, Bankrupt,

Appellee.

Transcript of Record

Appeal from the United States District Court, Southern District of California Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12811

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the Southern District of California, Central Division

In Bankruptcy—No. 45868-WM

In the Matter of
JUVENILE PRODUCTS OF PASADENA, a Corporation,

Debtor.

IN PROCEEDINGS FOR AN ARRANGEMENT UNDER CHAPTER XI OF ACTS OF CONGRESS RELATING TO BANKRUPTCY

To the Honorable ....., Judge of the District Court of the United States for the Southern District of California, Central Division:

The Petition of Juvenile Products of Pasadena, of the City of Pasadena, County of Los Angeles, State of California, engaged in the business of manufacturing wooden toys and juvenile equipment, respectfully represents as follows:

I.

Your petitioner is a corporation duly organized and existing under and by virtue of the laws of the State of California, and is not a municipal, railroad, insurance or banking corporation or a building and loan association. Your petitioner has had its place of business at 81-89 Masonic Court, Pasadena, California, and within the above judicial district for a longer period than six months pre-

ceding the filing of this petition than in any other judicial district. [2*]

II.

No bankruptcy proceeding, initiated by a petition by or against your petitioner is now pending.

III.

Your petitioner, while engaged in the manufacture of wooden toys and juvenile equipment in Pasadena, California, and on December 30, 1947, suffered extensive damage by fire to its tenanted premises, destruction of manufactured inventory and supplies, and damage to manufacturing equipment which fire loss has resulted in operation delay and production loss and resulted in the inability of the Company to pay its debts when they matured, and seeks an arrangement for extension of time in which to pay its debts under the provisions of Chapter XI of the Acts of Congress relating to bankruptcy, and that it can, by the use of the fire loss payments in partial recoupment of its fire loss and by an extension of time granted for payment to the unsecured creditors of the Petitioner as hereinafter proposed, recover from its losses caused by said operation delay and its resultant production losses and proposes an arrangement with its unsecured creditors, as follows:

(a) That petitioner as Debtor will pay in cash in full all costs of administration as fixed and determined by order of the Court;

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

(b) That Debtor will undertake and assume to pay all valid claims entitled to priority;

(c) That Debtor will pay its valid unsecured creditors, after their claims have been finally fixed and determined, in full, as follows:

(1) That upon the 1st day of June, 1948, and upon receipt by it of its funds from its insurance losses amounting to approximately $10,700.00, the Debtor will pay to each Unsecured Creditor an amount pro rata of 10% of the amounts received by it from its sales as the claim of said Unsecured Creditor bears to the total amount of the claims of all other said Unsecured Creditors and [3] will pay said pro rata of said 10% of said receipts from its sales regularly on or before the 1st day of each calendar month thereafter until the full amount of the claim of each Unsecured Creditor has been paid together with interest at the rate of 6% per annum from the effective date of this agreement until paid.

(2) That Debtor, during the life of this arrangement, agrees that it will not transfer or assign, hypothecate, encumber or otherwise put out of its control any asset nor will it assume liability other than in the general course of its business, except as may be approved by this Court, and will conduct its business for the general advantage of all persons concerned and will make available to any said Unsecured Creditor any information pertinent to its interest upon written request, including information respecting an accurate report of its receipts from its sales, confidential trade secrets excepted, and that said information shall not be communicated

to any person not in confidential relation with said Unsecured Creditor and whose attempted disclosure can not be controlled by said Unsecured Creditor.

(d) That this Court retain jurisdiction upon approval of said arrangement.

IV.

The schedules hereto annexed and marked Schedule "A" and "B" and verified by your Petitioner contain a full and true statement of all of its debts and, so far as it is possible to ascertain, the names and addresses of its creditors, and a full and true statement of its Assets, and such further statements concerning said debts and assets as are required by the provisions of the Acts of Congress relating to bankruptcy.

V.

There are no known executory contracts by your Petitioner.

VI.

The statement hereto annexed and marked "Statement of [4] Affairs" and verified by your Petitioner contains a full and true statement of its affairs as required by the provisions of said Act; and your Petitioner further states in that connection that it has attempted to continue its manufacturing business despite its operation loss and production delay that resulted from its fire loss, as hereinbefore mentioned, and that it has an inventory of materials in the process of manufacture amounting to in excess of $4,500.00 which added to funds payable for inventory loss and destruction, amounts to its normal

inventory in the average amount of $15,000.00; that it and the Metal Arts Company, the copartnership to the business of which it succeeded, had annual sales as follows:

1945	Approx. $290,000.00
1946	Approx. 260,000.00
1947	Approx. 250,000.00

and that Petitioner has orders on hand amounting to approximately $16,000.00, incoming orders amounting to between $500.00 to $1,000.00 each day, which it could fill if allowed to continue its manufacturing and selling operations, and would thereby protect its earning capacity and the value of its assets as a going concern in anticipation of the confirmation by this Court of Petitioner's proposed arrangement for payment to its unsecured creditors, which arrangement is dependent upon operation of its business.

VII.

That it would be for the best interests of all parties concerned if Petitioner is allowed to continue to operate in the regular course of business, without interruption incident to the filing of its petition for arrangement, until further order of this Court.

Wherefore, your Petitioner prays that proceedings may be had upon said petition in accordance with the provisions of Chapter XI of the Acts of Congress relating to bankruptcy, and that this matter should be referred generally to a referee in bankruptcy; and [5] that an order be entered herein

continuing Petitioner in possession and authorizing it to continue to operate and manage its property, pending the confirmation or refection of its proposed arrangement and until further order of this Court.

JUVENILE PRODUCTS OF
PASADENA, a Corporation,

By /s/ VANCE PRATHER,
President.

/s/ WILLIAM E. PRATHER,
Attorney for Petitioner.

State of California,
County of Los Angeles—ss.

Vance Prather, being first duly sworn, deposes and says:

That he is the president of the Petitioner in the above-entitled proceedings and makes this verification in behalf of said Petitioner; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge except as to those matters which are therein stated on his information and belief, and as to those matters he believes them to be true.

/s/ VANCE PRATHER.

Subscribed and sworn to before me this 6th day of April, 1948.

[Seal] /s/ MILDRED WITBRACHT,
Notary Public in and for the County of Los Angeles, State of California. [6]

Certificate

I Hereby Certify that the following is a full, true and correct copy of certain Resolutions duly adopted by the Board of Directors of Juvenile Products of Pasadena, a California corporation, at a regular meeting of said Board held on the 5th day of April, 1948:

> "Resolved: That it is in the best interests of this corporation that the corporation shall immediately institute proceedings under Chapter XI of the laws of the United States pertaining to Bankruptcy.
>
> "Be It Further Resolved: That the President and/or Secretary of this Corporation be, and they hereby are authorized, empowered and directed to execute such documents and instruments as shall be necessary, proper or required, on behalf of the corporation, for the prosecution of proceedings under said Chapter XI of the laws of the United States pertaining to Bankruptcy."

I do further certify that the foregoing resolution is still in full force and effect, and same has not been amended or repealed.

Witness my hand and the seal of this corporation this 6th day of April, 1948.

/s/ VANCE PRATHER,
President. [7]

Summary of Debts and Assets
(From the Statements of the Debtor in Schedules A and B)

Schedule A 1-a	Wages	$ 8,736.91
Schedule A 1-b (1)	Taxes due United States	6,085.79
Schedule A 1-b (2)	Taxes due States	1,488.68
Schedule A 1-b (3)	Taxes due counties, districts and municipalities	83.38
Schedule A 1-c (1)	Debts due any person, including the United States, having priority by laws of the United States	
Schedule A 1-c (2)	Rent having priority	1,725.00
Schedule A 2	Secured claims	22,313.52
Schedule A 3	Unsecured claims	87,899.59
Schedule A 4	Notes and bills which ought to be paid by other parties thereto	
Schedule A 5	Accommodation paper	
	Schedule A, total	$128,332.87
Schedule B 1	Real estate	$ 61,986.12
Schedule B 2-a	Cash on hand	
Schedule B 2-b	Negotiable and non-negotiable instruments and securities	
Schedule B 2-c	Stocks in trade	4,500.00
Schedule B 2-d	Household goods	
Schedule B 2-e	Books, prints and pictures	
Schedule B 2-f	Horses, cows and other animals	
Schedule B 2-g	Automobiles and other vehicles	1,200.00
Schedule B 2-h	Farming stock and implements	
Schedule B 2-i	Shipping and shares in vessels	
Schedule B 2-j	Machinery, fixtures and tools	15,071.59
Schedule B 2-k	Patents, copyrights, trade-marks	26,770.79
Schedule B 2-l	Other personal property	
Schedule B 3-a	Debts due on open accounts	6,416.57
Schedule B 3-b	Policies of insurance	
Schedule B 3-c	Unliquidated claims	3,300.00
Schedule B 3-d	Deposits of money in banks and elsewhere	10,792.19
Schedule B 4	Property in reversion, remainder, expectancy or trust	200.00
Schedule B 5	Property claimed as exempt	
Schedule B 6	Books, deeds and papers	
	Schedule B, total	$130,237.26

Juvenile Products of Pasadena,

/s/ VANCE PRATHER, President.

Statement of Affairs
(Form No. 3)

(For Bankrupt or Debtor engaged in business)

(Instructions: Each question herein must be answered or the failure to answer explained. If the answer is "none," this should be stated. If additional space is needed for the answer to any question, a separate sheet properly identified and made a part hereof, should be used and attached. If the Bankrupt or Debtor is a partnership or a corporation, the answers should be made on behalf of such partnership, or corporation, and the statement should be verified by a member of the partnership or a duly authorized officer of the corporation.)

To The Honorable.....Judge of the District Court of the United States for the Southern District of California, Central Division:

The Petition of (Name in Full) Juvenile Products of Pasadena, of (Residence Address) 81-89 Masonic Ct., City of Pasadena, in the County of Los Angeles, Southern District of the State of California, and by occupation Manufacturer of wooden toys and Juvenile equipment.

Respectfully Represents:

1. That the Petitioner is now (or was until the .....day of ....., 19....) engaged in the business of: Manufacture of wooden toys and juvenile equipment under the name of Juvenile Products of Pasadena, at the address 81-89 Masonic Ct., Pasadena, Calif.

That the Petitioner commenced such business on or about the date as of June 30, 1947.

That during the six years immediately preceding the filing of the original Petition herein, the Petitioner was engaged in the business, at the addresses and with the partners, joint adventurers or other associates, as follows:

From (date): To (date): June 30, 1947, to present.
Nature of Business: Same as above.
Address of Business: Same as above.
Names of Partners or Associates: A corporation.

2. That during the two years immediately preceding the filing of the original Petition herein, the books of account and records of the Petitioner have been kept by or under the supervision of:

From (date): To (date): June 30, 1947, to date.
Name of Bookkeeper: Virginia McDonald, Secretary-Treasurer and office manager.
Address of Bookkeeper: 260 Burton Court, Pasadena, Calif.

That during the two years immediately preceding the filing of the original Petition herein, the books of account and records of the Petitioner have been audited by:

Date of Audit: Since date of June 30, 1947, two audits as of June 30 and December 31, 1947.
Name of Auditor: Stacy & Fifer.
Address of Auditor: 7225 Beverly Blvd., Los Angeles, Calif. [29]

That the books of account and records of the Petitioner are now in the possession of petitioner at the address 81-89 Masonic Court, Pasadena, Calif.

3. That the dates, and the names and addresses of the persons to whom the Petitioner has issued financial statements (including those to mercantile and trade agencies), upon his business and property within the two years immediately preceding the filing of the original Petition herein, are as follows:

Date: None.
Name of Concern:
Nature of Business:
Address:

4. That the last inventory of the Petitioner's property was taken on the 30th day of June, 1947, by (or under the supervision of) Charles Milham, address, offices of petitioner; and the said inventory was taken at (cost, market value, or otherwise) cost; and the amount of said inventory was $28,356.20.

That the next prior inventory to the last inventory taken of Petitioner's property was taken on the.....day of....., 19.... by (or under the supervision of) ....., address ..... and the said inventory was taken at (cost, market value, or otherwise).....; and the amount of said inventory was $.....

That the records of the investor above referred to are in the possession of petitioner, address 81-89 Masonic Ct., Pasadena, Calif. Petitioner not operating prior to June 30, 1947.

5. That the dates, sources, particulars and

amounts of income received by the Petitioner during each of the two years immediately preceding the filing of the original Petition herein, other than from the operation of Petitioner's business, are as follows:

Date: None.
Source from which Received:
Amount Received:
Particulars:

6. That the last filing of a U. S. Federal Income Tax Return by the Petitioner was for the year.....and was filed by the Petitioner at the office of U. S. Collector of Internal Revenue at: (None filed on fiscal year basis).

That the last filing of a State Income Tax Return by the Petitioner was for the year.....and was filed by the Petitioner at the office of..... .....of the State of....., at: (None filed on fiscal year basis).

7. That within the two years immediately preceding the filing of the original Petition herein, the Petitioner maintained bank accounts, alone or together with any other person, and in Petitioner's own name or any other name, as follows:

Name and Address of Bank:

Bank of America NT&SA, 160 E. Colorado, Pasadena.

Account in Name of:

Juvenile Products of Pasadena.

Names of Persons authorized to make withdrawals:

Virginia McDonald and/or Vance Prather.

Name and Address of Bank:

Union National Bank, Arroyo Pkwy & Colorado, Pasadena, Calif.

Account in Name of:

Juvenile Products of Pasadena.

Names of Persons authorized to make withdrawals:

Virginia McDonald and/or Vance Prather. [30]

That within the two years immediately preceding the filing of the original Petition herein, the Petitioner maintained safe deposit boxes or other depositories for Petitioner's securities, cash, or other valuables, as follows:

(Note: Give the name and address of each bank, or other depository, the name in which each box or other depository was kept, the name of every person who had the right of access thereto, a brief description of the contents thereof, and if surrendered, when surrendered, or if transferred, when transferred and the name and address of the transferee.)

None.

8. That the only property or properties held in trust by Petitioner for any other person are as follows:

(Note: Give name and address of such person or persons and a description of the property and the amount or value thereof.)

None.

9. That within the six years immediately preceding the filing of the original Petition herein, pro-

ceedings under the Bankruptcy Act have been brough by or against the Petitioner as follows:

(Note: Give the location of the Bankruptcy Court, the nature of the proceeding, and whether a discharge was granted or refused, or a composition arrangement or plan was or was not confirmed.)

None.

That at the time of the filing of the original Petition herein, certain property of the Petitioner was in the hands of a receiver or trustee, as follows:

(Note: If so, give the name and location of the Court, the nature of the proceedings, a brief description of the property, and the name of the receiver or trustee.)

None.

That within the two years immediately preceding the filing of the original Petition herein, the Petitioner made assignments of Petitioner's property for the benefit of creditors or general settlement with Petitioner's creditors, as follows:

(Note: If so, give dates, the name of the assignees, and a brief description of the terms of assignment or settlement.)

None.

10. That during the year immediately preceding the filing of the original Petition herein, the Petitioner made repayments of loans, as follows:

(Note: Give the name and address of the lender, the amount of the loan and when re-

ceived, the amount and date when repaid, and, if the lender is a relative, the relationship. If the Bankrupt or Debtor is a partnership, state whether the lender is or was a partner or a relative of a partner, and if so, the relationship.)

The petitioner received all of the assets subject to all liabilities of the Metal Arts Company, a copartnership, by the issuance of its stock amounting to $78,500.00; that as a part of the obligations of the manufacturing business, the assets of which it received thereby certain payments on loans previously made were made. Those obligations are listed in petitioner's schedules of assets and liabilities and are so identified.

11. During the year immediately preceding the filing of the original Petition herein, the Petitioner transferred or disposed of, other than in the ordinary course of business, the following assets or properties:

(Note: Give a description of the properties, the date of the transfer or disposition, to whom transferred or how disposed of and, if the transferee is a relative, the relationship, the consideration, if any, received therefor, and the disposition of such consideration.)

None.

12. That during the year immediately preceding the filing of the original Petition herein, the Petitioner assigned accounts receivable as follows: Date of Assignment: Name of Assignee: Address of Assignee:

That petitioner for the purpose financing its business operations entered into financing arrangements with two different individuals at different periods. A period was with A. D. Nast, Jr., d/b/a Nast & Co., 321 S. Beverly Drive, Beverly Hills, Calif., from February through November, 1947; during that period, accounts receivable were also financed with Ray S. Carson, 385 East Green St., Pasadena, Calif., and/or with the California Investors, a copartnership, of which petitioner is informed he was a copartner.

13. That during the year immediately preceding the filing of the original Petition herein, the Petitioner suffered losses from fire, theft or gambling as follows:

Date: December 30, 1947.
How Lost: Fire and water damage.
Amounts of Money or General Description of Property: Merchandise, finished and raw, machinery and equipment, leasehold improvements, and use and occupancy (the last undetermined). [32]

(If the Bankrupt or Debtor is a partnership or corporation the following additional questions should be answered.)

14. That during the year immediately preceding the filing of the original Petition herein, personal withdrawals, including loans, have been made by each member of the partnershp, or by each officer,

director or managing executive of the corporation, as follows:

Date of Withdrawal: Dates disclosed by company's books.

Amount of Withdrawal: $100.00 pr. wk.

Name and Office Held of Person Withdrawing: Virginia McDonald, Secretary, Treasurer and office manager.

Purpose of Withdrawal: Drawings against compensation.

Date of Withdrawal: Dates disclosed by company's books.

Amount of Withdrawal: $200.00 pr. wk.

Name and Office Held of Person Withdrawing: Vance Prather, President and general manager.

Purpose of Withdrawal: Drawings against compensation.

Date of Withdrawal: Dates disclosed by company's books.

Amount of Withdrawal: $50.00 pr. wk.

Name and Office Held of Person Withdrawing: Virginia Prather, vice-president and director of design.

Purpose of Withdrawal: Drawings against compensation.

15. (If the Bankrupt or Debtor is a Partnership) The names and addresses of the members of the partnership, comprising the Petitioner, are as follows:

Name of Partner: Corporate entity.

Address:

(If the Bankrupt or Debtor is a Corporation) The

names, titles or offices held, and addresses of the officers, directors and managing executive and of each stockholder holding twenty-five (25%) percent of the issued and outstanding stock of the corporation petitioner, are as follows:

Name: Vance Prather.

Office Held or Percent of Stock Held; President, 90%.

Address: 2850 N. Marengo, Altadena, Calif.

Name: Virginia McDonald.

Office Held or Percent of Stock Held: Secretary, 10%.

Address: 260 Burton Court, Pasadena, Calif.

JUVENILE PRODUCTS OF PASADENA,

By /s/ VANCE PRATHER,
Bankrupt or Debtor,
(Vance Prather,
President).

/s/ WILLIAM E. PRATHER,
Attorney for Petitioner. [33]

Oath to Statement of Affairs

State of California,
County of Los Angeles—ss.

On this 5th day of April, A.D. 1948, before me personally came Vance Prather, President of the Juvenile Products of Pasadena, a Corporation, the officer duly authorized to make this verification and who subscribed to the foregoing Statement of Af-

fairs and who, being by me first duly sworn, did declare that the answers therein contained are true and correct to the best of his knowledge and belief.

[Seal]: /s/ MILDRED WITBRACHT,
Notary Public.

Com. Exp. 9-3-1950.

[Endorsed]: Filed April 6, 1948. [34]

[Title of District Court and Cause.]

APPROVAL OF DEBTOR'S PETITION AND ORDER OF REFERENCE UNDER SECTION 322 OF THE BANKRUPTCY ACT

At Los Angeles, in said District, on April 6, 1948, before the said Court the petition of Juvenile Products of Pasadena, a corporation, that he desires to obtain relief under Section 322 of the Bankruptcy Act, and within the true intent and meaning of all the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said petition is hereby approved accordingly.

It is thereupon ordered that said matter be referred to Benno M. Brink, Esq., one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said Juvenile Products of Pasadena, a corporation, shall attend before said referee on April 13, 1948, and at such times as said referee shall designate, at his office in Los Angeles, California, and

shall submit to such orders as may be made by said referee or by this Court relating to said matter.

Witness, the Honorable Leon R. Yankwich, Judge of said Court, and the seal thereof, at Los Angeles, in said District, on April 6, 1948.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ F. BETZ,
Deputy Clerk.

[Endorsed]: Filed April 6, 1948. [35]

[Title of District Court and Cause.]

BOND OF H. B. KELLEY, DISBURSING OFFICER

Know All Men By These Presents:

That we, H. B. Kelley of Pasadena, California, as Principal, and the Fidelity and Deposit Company of Maryland, a corporation duly incorporated under the laws of the State of Maryland and authorized to act as Surety under the act of Congress approved August 13, 1894, whose principal office is located in Baltimore, State of Maryland, as Surety, are held and firmly bound unto the United States of America in the sum of Twenty Five Hundred and No/100 Dollars ($2500.00), in lawful money of the United States, to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves and our heirs, executors, adminis-

trators, successors and assigns, jointly and severally, by these presents.

Signed and sealed this 7th day of June, A.D., 1948.

The Condition Of This Obligation Is Such, That, Whereas, the above named H. B. Kelley was, on the 4th day of June, A.D. 1948, appointed Disbursing Officer in the case pending in bankruptcy in the said Court, wherein Juvenile Products of Pasadena, a Corporation is the Debtor, and he, the said H. B. Kelley, has accepted said trust with all the duties and obligations pertaining thereto.

Now, Therefore, if the said H. B. Kelley, Disbursing Officer, as aforesaid, shall obey such orders as said Court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets, and effects of the estate of the said Debtor which shall come into his hands and possession and shall in all respects faithfully perform all his official duties as said Disbursing Officer, then this obligation to be void; otherwise to remain in full force and virtue.

Signed and sealed in the presence of:

[Seal] H. B. KELLEY.

/s/ WILLIAM E. PRATHER,

/s/ VIRGINIA McDONALD.

Examined and recommended for provided in Rule 8.

/s/ WILLIAM E. PRATHER.

Attorneys.

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,

By /s/ WM. C. FUNDENBERG,
Attorney-in-Fact.

Attest:

/s/ S. M. SMITH,
Agent.

Approved this 10th day of June, A.D., 1948.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

State of California,
County of Los Angeles—ss.

On this 7th day of June, 1948, before me, Theresa Fitzgibbons, a Notary Public, in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared Wm. C. Fundenberg, known to me to be the Attorney-in-Fact, and S. M. Smith, known to me to be the Agent of the Fidelity and Deposit Company of Maryland, the Corporation that executed the within instrument, and acknowledged to me that they subscribed the name of the Fidelity and Deposit Company of Maryland thereto and their own names as Attorney-in-Fact and Agent, respectively.

[Seal] /s/ THERESA FITZGIBBONS,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires May 3, 1950.

[Endorsed]: Filed, Referee, June 10, 1948.
[Endorsed]: Filed U.S.D.C., June 11, 1948. [36]

[Title of District Court and Cause.]

ORDER CONFIRMING ARRANGEMENT OF DEBTOR UNDER CHAPTER XI OF ACTS OF CONGRESS RELATING TO BANKRUPTCY

The petition of Juvenile Products of Pasadena, a Corporation, Debtor, for confirmation of its arrangement under Chapter XI of Congress relating to Bankruptcy came on regularly to be heard before the Honorable Benno M. Brink, Referee in Bankruptcy, in the Courtroom, 323 Federal Building, Temple and Spring Streets, Los Angeles, California, on the 5th day of May, 1948, at the hour of 2:00 o'clock p.m. of said day, and was regularly thereafter continued to the 6th day of May, 1948, to the 14th day of May, 1948, and the 4th day of June, 1948, respectively, and that thereupon the arrangement of Debtor was submitted to the Court for its confirmation; and

It appearing to the Court that said Juvenile Products of Pasadena, a Corporation, Debtor, filed a petition for an arrangement under Chapter XI of Acts of Congress relating to Bankruptcy on April 6, 1948, the filing of which petition was approved by Court and a general reference was made to the Honorable Benno M. Brink, Referee in Bankruptcy, in this Court; that said Debtor, Juvenile Products of Pasadena, a Corporation, has filed its plan of arrangement and that [37] the same is contained in its petition for an arrangement under Chapter XI of Acts of Congress relating to Bankruptcy and that due and regular notice to creditors

and parties in interest as is provided by said Act has been made and given; and

It appearing to the Court that application for confirmation has been made; and

It appearing that said arrangement has been duly accepted in accordance with the provisions of said Chapter XI in that consents in writing have been filed by unsecured creditors of said Debtor and that the same constitute and are a majority in number of all creditors affected by said arrangement whose claims have been filed in these proceedings and which number represent a majority in amount of said claims generally; and that no written objections to said arrangment of Debtor have been filed herein; that said arrangement is for the best interests of the creditors of said Debtor and that it is fair, equitable and feasible; and that Debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt; and that the proposal and its acceptance are in good faith and have not been made or procured by any means, promises, or acts forbidden by the Acts of Congress relating to Bankruptcy; and

It further appearing to the Court that a Creditors' Committee consisting of M. W. Engleman, as chairman, and Harry Frantz and H. W. Everts, all of Los Angeles, California, have been duly and regularly nominated for and appointed to act as said Creditors' Committee herein until further order of Court; and that it is for the best interests of the creditors that a person satisfactory to the

parties in interest be appointed as a Disbursing Officer of this Court to collect, receive, and to disburse monies and funds as in the arrangement of Debtor and as in this order hereinafter provided and that, upon qualifying, he be required to file a bond of a reputable surety company in the amount of $2,500.00, to be approved by [38] this Court, and to act, in addition, as a representative of the creditors herein, also as in this order hereinafter provided, and that H. B. Kelley of South Pasadena, California, has been nominated for and has been appointed by this Court, until further order of this Court, as said Disbursing Officer and as said representative of the creditors and that he has duly qualified as said Disbursing Officer and is presently acting; and

It further appearing to the Court that under said arrangement of Debtor and under Chapter XI of the Bankruptcy Act that a deposit of $1,627.49 to Edmund L. Smith, Clerk of this Court, for Referee's Expense Fund, Reporter's fees, and Referee's Salary Fund has been made by said Disbursing Officer and that said Disbursing Officer holds additional amounts of $370.06 for Referee's Expense Fund and $740.13 for Referee's Salary Fund and that William E. Prather, Esq., as attorney for Debtor has waived in open court the immediate payment of his attorney's fees, but has not waived the payment of said fees as to priority when hereafter fixed and determined by this Court; and

It further appearing to the Court that under the arrangement of Debtor and under Chapter XI of

the Bankruptcy Act that all valid claims entitled to priority be paid in full which have not been waived as to immediate payment and that all other valid claims entitled to priority be paid the amounts of immediate payment required as under the terms of the respective written waivers on file herein set out, and that said Disbursing Officer holds funds for and is ready to disburse all amounts of said valid prior claims which have not been waived and the amounts required for immediate payment as in said written waivers set out;

It Is Hereby Ordered:

1. That the Arrangement Under Chapter XI of Acts of Congress relating to Bankruptcy of the Juvenile Products of Pasadena, a Corporation, Debtor, on file herein, be and the same is hereby confirmed. [39]

2. That the Debtor be and it is hereby continued in possession of its properties and assets, and is hereby authorized and directed to manage, maintain, operate and keep in proper condition and repair the assets and property of the Debtor and to manage, operate, and conduct the business of Debtor and to this end to exercise its authority and franchises and discharge all duties obligatory upon it; to employ and discharge and fix the compensation of its employees, except those of its Secretary-Treasurer and Office Manager, Virginia McDonald, and its President, Vance Prather, whose salaries are hereby fixed at $75.00 per week and

$100.00 per week, respectively, until further order of this Court, and except the compensation of its Disbursing Officer and Creditors' Representative which is fixed as hereinafter provided; to collect and receive the income, rents, revenues, issues, and profits of all its assets, properties, and business and to collect all outstanding accounts; and to continue, until further order of this Court, the business of the Debtor making purchases of materials and supplies and sales of products in the regular course of business, all according to law and subject to the provisions of this order and to such supervision and control by this Court as the Court may exercise by further orders made when duly and regularly applied for herein; that Debtor, during the life of its arrangement will not transfer, or assign, hypothecate, encumber or otherwise put out of its control any asset nor will it assume liability other than in the general course of its business, except as may be approved by this Court, and will conduct its business for the general advantage of all persons concerned.

3. That a person satisfactory to the parties in interest herein be appointed as a Disbursing Officer of this Court to collect, receive, and to disburse monies and funds as in the arrangement of Debtor and as in this order hereinafter provided and that, upon qualifying, he be required to file a bond of a reputable surety company in the amount of $2,500.00, to be approved by this Court, and to [40] act, in addition, as a representative of the creditors and the parties in interest herein, also as in this

order hereinafter provided and designated as Creditors' Representative, and that he will devote all time and attention necessary thereto and shall receive as his compensation in full for his services as said Disbursing Officer and as Creditors' Representative a sum in addition to any compensation provided for in said Chapter XI of the Bankruptcy Act until his compensation equal $75.00 per week for each five-day week, or on that basis for any less time, that he may necessarily devote as said Disbursing Officer and said Creditors' Representative; and that H. B. Kelley of South Pasadena, California, be and is hereby appointed as said Disbursing Officer and as said Creditors' Representative, until further order of this Court.

4. That Debtor shall close its present books as of midnight of the date of this order of confirmation and the Debtor shall open new books of account immediately thereafter, and cause to be kept therein due and proper accounts of the earnings, expenses, receipts, and disbursements of the Debtor, and shall preserve proper vouchers for all payments made upon disbursement thereof, and deposit the monies coming into the possession of the Debtor in the bank in which the funds of the Debtor are presently deposited, or such other bank as may be selected by the board of directors of said Debtor, provided that such bank be an authorized depository of the funds under the jurisdiction of this Court and, provided further, that all vouchers in disbursement bear the signature of said Creditors'

Representative in addition to that of the Secretary-treasurer of said Debtor.

5. That said Creditors' Representative shall file with this Court on or before the 20th day of each calendar month a statement of assets and liabilities of the Debtor as of the last day of the preceding month, together with a summary statement of the revenues and expenses of the Debtor for such month and that a copy thereof be [41] mailed to the Creditors' Committee in care of its chairman; that he shall make available to any unsecured creditor herein any information pertinent to its interest upon written request, including an accurate report of Debtor's receipts from its sales, confidential trade secrets excepted, and that said information shall not be communicated to any person not in confidential relation with said unsecured creditor and whose attempted disclosure cannot be controlled by said unsecured creditor; and that, in the event of the inability of said Creditors' Representative to act, that said Debtor comply with the provisions of this paragraph.

6. That Debtor shall pay in cash in full, in addition to the deposit heretofore made to the Clerk of this Court of $1627.49 and in addition to the amounts hereby ordered to be held by said Disbursing Officer of $370.06 for Referee's Expense Fund and $740.13 for Referee's Salary Fund, all costs and expenses of administration as fixed and determined by this Court.

7. That Debtor shall undertake to pay and pay,

in addition to the payment of all valid claims entitled to priority which have not been waived as to immediate payment and in addition to the amounts of immediate payment required as under the terms of the respective written waivers on file herein set out, all valid claims entitled to priority as in the terms of their respective written waivers set out or as may be modified in writing subsequently, and that with respect to the claim of the Bureau of Internal Revenue, United States Treasury Department, amounting to $8,366.83 the immediate payment of which has been waived on the basis of a cash payment of $1,366.83 upon the confirmation of the arrangement of Debtor and the balance in twelve equal monthly installments of approximately $583.00 each, payable monthly and commencing thirty days after the entry of this order of confirmation plus statutory interest on the outstanding balances and is conditioned that the Debtor, during the life of its arrangement, assume the liability for, and agrees to pay in full to the [42] United States of America, any and all Federal taxes legally due from the Debtor, the Receivers, or Trustees thereof, whether or not proofs of claim therefor have been filed in this proceeding; that such taxes shall be paid by the Debtor, during the life of its arrangement, when, as, and if they may become due and the lien therefor, if any, and the priorities with respect thereto shall not be affected by the confirmation of Debtor's arrangement but shall remain unimpaired until the taxes shall have been fully paid or satisfied;

that the United States of America is hereby granted the same remedies against the Debtor, during the life of its arrangement, and against its assets, with regard to the collection of such taxes, as it had against the Debtor theretofore; that all statutes of limitation upon the collection of such claims shall be suspended during the time these proceedings are pending and for such additional period of time as such claims or any part thereof remain unpaid; that subject to its approval the Court shall retain jurisdiction over the assets herein dealt with and over any and all persons, firms, or corporations to which said assets may be transferred, and over all parties appearing herein for the purpose of carrying out and giving effect to any and all provisions of said arrangement and this order of confirmation insofar as said arrangement affects and applies to tax claims of the United States of America, or for the practical protection of the tax claims of the United States upon subsequent orders pertinent to, in amplification, extension, limitation, or in otherwise modification of this order of confirmation.

8. That Debtor shall pay its valid unsecured creditors, after their claims have been finally fixed and determined, in full, as follows:

That Debtor shall pay to said Disbursing Officer, duly appointed, qualified, and acting, and amount equal to 10% of the amounts received by it from its sales each month, commencing on the date of this order of confirmation and payable regularly on the 1st [43] day of each calendar month thereafter, until an amount equal to the amounts owing

to the valid unsecured creditors of Debtor has been paid in full, together with interest at the rate of 6% per annum from date of this order of confirmation until paid; that said Disbursing Officer shall thereupon pay to each valid unsecured creditors of Debtor an amount pro rata of said 10% as the amount of the claim of each valid unsecured creditor bears to the total amount of the valid unsecured claims of all other unsecured creditors of Debtor, regularly and monthly and on or before the 10th day of each calendar month thereafter, until the full amount of the claim of each unsecured creditor has been paid in full, together with interest at the rate of 6% per annum from the date of this confirmation order until paid; provided, that any said unsecured creditor may consent in writing to receive its said pro rata payment at longer intervals than one month.

9. That this Court reserves the full right and jurisdiction to make from time to time such orders as this Court may deem proper in executing the powers conferred by the provisions of Chapter XI of the Bankruptcy Act; and in general this Court reserves full right and jurisdiction to make from time to time such orders amplifying, extending, limiting, or otherwise modifying this order and all orders now or hereafter made herein as to this Court may at any time seem proper.

Done this 24th day of July, 1948.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

United States of America,
Southern District of California, Central Division—ss.

I do hereby certify that the within instrument is a true and correct copy of the original thereof as the same appears of record in my office.

In witness whereof, I hereunto set my hand this 24th day of July, 1948.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed, Referee, July 24, 1948.

[Endorsed]: Filed, U.S.D.C., July 27, 1948. [44]

[Title of District Court and Cause.]

ORDER OF ADJUDICATION

A hearing having been had herein under the provisions of Section 377(2) of Chapter XI of the Bankruptcy Act and Findings of Fact and Conclusions of Law having been made and filed herein, the Referee therefore makes the following order:

It Is Ordered that the within debtor be and it hereby is adjudged a bankrupt, and

It Is Further Ordered that bankruptcy be proceeded with pursuant to the provisions of the Bankruptcy Act.

Dated: December 13, 1948.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed, Referee, December 13, 1948.

[Endorsed]: Filed, U.S.D.C., December 16, [45] 1948.

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON PETITION FOR REVIEW OF ORDER IN RE CLAIM OF COLLECTOR OF INTERNAL REVENUE FOR WITHHOLDING TAXES

To the Honorable William C. Mathes, Judge of the Above-Entitled Court:

I, Benno M. Brink, one of the Referees in Bankruptcy of said Court, before whom the above-entitled matter is pending under an order of general reference, do hereby certify to the following:

The United States of America has duly filed its petition for the review of an order made by your Referee in this matter on March 3, 1950, in which he held that a claim filed in this proceeding by the Collector of Internal Revenue for withholding taxes was not entitled to any priority or preference over other obligations incurred by the above-named [46] bankrupt while it was operating its business as a debtor in possession under the provisions of Chapter XI of the Act of Congress relating to Bankruptcy.

The Proceedings

This proceeding began by the filing herein on April 6, 1948, of a petition under Section 322 of Chapter XI of the Act of Congress relating to Bankruptcy. Thereafter, on July 24, 1948, an order was duly entered confirming the plan of arrangement proposed by the bankrupt (then debtor) in

the said Chapter XI proceeding. Under the said plan of arrangement the debtor remained in possession of its property and continued the operation of its business. The Court, however, retained full jurisdiction over the debtor and its property.

On December 13, 1948, an order was duly entered herein terminating the proceeding under Chapter XI and adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with.

The assets in the possession of the trustee in bankruptcy herein are insufficient to pay in full the obligations incurred by the bankrupt during its operations as a debtor in possession prior to the aforesaid order of adjudication.

In its said operations the bankrupt deducted withholding taxes from wages and salaries paid by it to its employees. In due course the Collector of Internal Revenue filed herein his claim for $1,757.82, being the amount of the said taxes which were deducted, as aforesaid.

On December 16, 1949, upon the petition of the trustee in bankruptcy herein, an order to show cause was issued requiring the Collector of Internal Revenue to show cause why it should not be decreed that the aforesaid claim [47] for $1,757.82 should be paid ratably with all other Chapter XI obligations arising in this proceeding. Other matters were included in the said order to show cause which are not involved in this review.

The said order to show cause was duly heard and on March 3, 1950, your Referee filed his Findings of Fact and Order in which he allowed the afore-

said claim as a claim to participate ratably with the other claims which arose under the aforesaid Chapter XI operations and in which he denied the said claim any priority whatsoever over any other claims which arose in or out of such operations. It is from the said order that this review is taken.

The Questions Presented

The questions presented by this review are set forth in detail on pages 5 and 6 of the petition for review which is going up with this certificate but, in the opinion of your Referee, they may be summarized as follows:

(1) Does the evidence in this matter show that the bankrupt, from time to time, had funds with which to create a trust to provide for the payment of the taxes deducted by it from the wages and salaries of its employees?

(2) Is the claim here involved entitled to priority over other claims arising under the Chapter XI operations in this case?

(3) Are all the assets in the hands of the trustee in bankruptcy herein constructively impressed with a trust for the payment of the withholding taxes here involved?

The Evidence

The evidence in this matter may be summarized as follows: [48]

The bankrupt carried on its Chapter XI opera-

tions at a heavy loss. During such operations it did not acquire any new property. On the contrary, the assets it had at the commencement of the said operations were substantially reduced thereby.

The bankrupt, in its operations as debtor in possession, deducted withholding taxes from the wages and salaries of its employees but it did not at any time create a special fund for any of the amounts so deducted. Furthermore, it did not at any time during the said operations have the funds necessary to create such a special fund. In other words, the bankrupt simply deducted the taxes here in question. It did not set apart the necessary funds to pay the same and it could not have done so at any time during the said operations.

No trust fund for the payment of withholding taxes was taken over by the trustee in bankruptcy in this case.

The assets in the hands of the trustee are insufficient to pay in full the obligations incurred by the bankrupt in its Chapter XI operations.

Referee's Findings of Fact and Order

The original of your Referee's Findings of Fact and Order in this matter is going up with this certificate.

Papers Submitted

The following papers are transmitted herewith:

1. Petition for Order to Show Cause, etc., filed December 16, 1949.

2. Order to Show Cause, etc., filed December 16, 1949.

3. Findings of Fact and Order on Order to Show Cause, filed March 3, 1950.

4. Motion and Order Extending Time to File a Petition for Review, filed March 13, 1950. [59]

5. Petition for Review, filed April 17, 1950.

Respectfully submitted this 19th day of May, 1950.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed, U.S.D.C., May 19, 1950. [50]

[Title of District Court and Cause.]

PETITION FOR ORDER TO SHOW CAUSE AND FOR AN ORDER TO RESTORE ORDER TO SHOW CAUSE TO CALENDAR

To the Honorable Benno M. Brink, Referee in Bankruptcy:

The verified petition of Paul W. Sampsell respectfully shows:

I.

That he is the duly appointed, qualified and acting trustee in bankruptcy herein.

II.

That the United States Government claims taxes due and owing for the year 1945 from Vance and Virginia Prather each in the sum of $1967.05; that the United States Government filed a lien against certain real property standing in the name of the

above-entitled bankrupt estate on November 7, 1947, to secure the payment of the aforesaid sums claimed to be due and owing on the individual income taxes of the said Vance and Virginia Prather; that the aforementioned real property against which the lien is asserted did at one [51] time stand in the names of Vance and Virginia Prather as joint tenants, but that the property was thereafter transferred from the said Vance and Virginia Prather to this bankrupt corporation, the date being recorded on July 14, 1947.

III.

That your trustee brought on an Order to Show Cause to determine the validity of the aforesaid liens asserted against the said real property, which Order to Show Cause was heard on the 8th day of June, 1949, and an Order was thereafter made on the said Order to Show Cause whereby the final settlement of the above-mentioned liens was deferred and further whereby it was directed that the claims of the Federal Government in and to the said real property under the asserted lien would attach to and be satisfied out of the proceeds of the sale of the real property upon the final determination of the validity of the liens of the Federal Government as aforesaid.

IV.

That after the making of the said Order on the 8th day of June, 1949, your trustee went into escrow and completed the sale of the above-mentioned real

property to the City of Pasadena, and now holds the proceeds of that sale subject to whatever claims the Federal Government may have as arising out of the aforementioned liens.

V.

That in addition to the aforementioned tax claims and liens of the United States Government the Collector of Internal Revenue asserts a claim in the sum of $1757.82 which is alleged to be taxes due and owing as a result of this bankrupt corporation's operation under the provisions of Chapter XI; that the Collector asserts that the said taxes should be paid in full and should not be required to share ratably with other claims arising out of the Chapter XI proceedings; that your trustee asserts that there is no priority of any kind or nature for the said claims of the Federal Government arising out of the Chapter XI proceedings, and that [52] the same should share ratably with other Chapter XI claims asserted in this bankruptcy.

Wherefore, your trustee prays that an Order issue restoring the aforementioned Order to Show Cause to the calendar requiring the Collector of Internal Revenue to be and appear before the Referee on a day fixed and then and there show what lien rights, if any, the Collector has in and to the proceeds of the sale of real property of the above-captioned bankrupt estate, and your trustee further prays that the Collector of Internal Revenue be ordered to appear before the Referee on a day fixed and then and there show why the claim

of the Collector of Internal Revenue in the sum of $1757.82 should not be paid ratably with all other Chapter XI obligations arising in this bankruptcy.

Dated: December 14, 1949.

/s/ PAUL W. SAMPSELL,
Trustee.

CRAIG, WELLER &
LAUGHARN,

By /s/ C. E. H. McDONNELL,
Attorneys for Trustee.

Duly verified.

[Endorsed]: Filed, Referee, December 16, [53] 1949.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE AND ORDER TO RESTORE ORDER TO SHOW CAUSE TO CALENDAR

Upon reading and filing the verified petition of Paul W. Sampsell, trustee herein, and good cause appearing,

Now, therefore, upon motion of Craig, Weller & Laugharn by C. E. H. McDonnell, attorneys for trustee,

It Is Ordered that the Order to Show Cause to determine the validity of tax liens asserted against

certain real property be restored to the calendar requiring the Collector of Internal Revenue to be and appear before the undersigned Referee in Bankruptcy in his courtroom, 323 Federal Building, Temple & Spring Streets, Los Angeles, California, on the 4th day of January, 1950, at the hour of 2:00 o'clock p.m. thereof, and then and there show what lien rights, if any, the said Collector of Internal Revenue has in and to the proceeds of the sale of real property of the above-captioned bankrupt estate, and further that the Collector of Internal Revenue be ordered to show why the claim of the Collector of Internal Revenue in the sum of [55] $1757.82 should not be paid ratably with all other Chapter XI obligations arising in this bankruptcy.

Dated: This 16th day of December, 1949.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed, Referee, December 16, [56] 1949.

In the United States District Court, Southern District of California, Central Division
No. 45,868-WM

In the Matter of

JUVENILE PRODUCTS OF PASADENA, a Corporation,

Bankrupt.

FINDINGS OF FACT AND ORDER ON ORDER TO SHOW CAUSE

This matter having come on for hearing on the verified petition of the trustee, Paul W. Sampsell, on January 4, 1950, before the undersigned Referee in Bankruptcy at the hour of 2:00 p.m. thereof, and the trustee having been represented and appeared by and through his counsel, Craig, Weller & Laugharn by Hubert F. Laugharn, and the Collector of Internal Revenue having appeared by and through his counsel Eugene Harpole, and evidence both oral and documentary having been educed and submitted to the Court,

Now, Therefore, the Court makes its Findings of Fact, Conclusions of Law and Orders as follows:

I.

The Court finds that it is true that income taxes and interest were due, owing and assessed against Vance Prather and Virginia Prather for the calendar year 1945 each in the sum of $1,967.05; that thereafter said 1945 income taxes were reduced by a recomputation and the allowance of a loss carry-

back by the Commissioner of Internal Revenue to the sum of $1,037.00, each, plus interest at 6% per annum, or 20c per day, from January 31, 1950, until paid; the Court finds that the Commissioner of Internal Revenue's Assessment List carrying said assessment of 1945 income taxes against Vance Prather and Virginia Prather, was received in the office of the Collector of Internal Revenue at Los Angeles, California, on the fourth day of December, 1946; thereafter notice and demand for the payment of said 1945 income taxes was issued to Vance Prather and Virginia Prather, the taxpayers but said taxes have not been paid. The Collector of Internal Revenue thereafter and on the seventh day of November, 1947, filed notices of liens securing payment of said taxes to the United States in the office of the County Recorder of Los Angeles County, State of California; the Court finds that liens in favor of the United States arose on December 4, 1946, which attached to all property and rights to property, whether real or personal then belonging to the taxpayers, Vance Prather and Virginia Prather, or thereafter acquired by them and said liens became valid as to all the world upon the filing of notice of them on November 7, 1947, in the office of the County Recorder of Los Angeles, State of California.

II.

That the taxpayers, Vance Prather and Virginia Prather were the owners of the following described real property on December 4, 1946:

"Lots 4 to 13, both inclusive of Mrs. Mary R. D. Gifford's Subdivision of Lot 4 in Block A of San Pasqual Tract, in the City of Pasadena, County of Los Angeles, State of California, as per map recorded in book 18, page 75 of Miscellaneous Records, in the office of the County Recorder of said County."

The said taxpayers, by a grant deed, dated June 27, 1947, and recorded in the office of the County Recorder of Los Angeles County, California, on July 14, 1947, conveyed said real property to "Juvenile Products Company of Pasadena a corporation," in exchange for that corporation's promise to issue certain shares of its capital stock to the grantors. A permit for the issue of said stock was obtained from the California Corporation Commissioner but none of said stock was ever actually issued to the taxpayers nor were they paid any other consideration for the transfer of said real property to the bankrupt. Vance Prather was the president of said corporation and Virginia Prather its Vice-President at the time of the execution of said grant deed. Both Vance Prather and Virginia Prather knew at the time of the execution of said grant deed that their 1945 income taxes had been assessed, were unpaid and that the Collector of Internal Revenue had demanded payment of said taxes.

III.

The Court finds that the sum of $1,757.82, is due and owing as withholding tax arising out of this bankrupt corporation's operation under the pro-

visions of Chapter XI and while within the jurisdiction of this Court; the Court further finds that when wages were paid by this bankrupt corporation during its operation under Chapter XI, the requirements that withholding taxes be withheld and placed in a trust fund were ignored, that is to say, the net amount—i.e. the gross amount of wages, less the amount of withholding tax—was at all times paid; the Court further finds that during the said operation under Chapter XI, this bankrupt corporation at no time had the funds to create or did it create a separate trust fund composed of that portion of the wages withheld for the payment of withholding taxes.

The debtor was adjudicated a bankrupt on December 10, 1948.

IV.

That the Court finds that certain tax claims on which liens are asserted have been filed by the Collector of Internal Revenue in this proceedings as follows:

Period	Tax	Total
4-¼-45	Withholding	$ 30.59
4-¼-46	Withholding	802.00
2-¼-47	Withholding	1,308.97
1946	Federal Unemployment	110.90
4-¼-47	Federal Insurance Contribution	708.60
		$2,961.06

Further interest to accrue on $2,456.81 at 6% per annum from January 31, 1950.

The Court further finds that the aforesaid liens

were on taxes assessed against Metals Arts Co., a co-partnership composed of Vance Prather and Virginia Prather, which co-partnership was a predecessor of the bankrupt corporation herein, which bankrupt corporation assumed the liabilities of the said co-partnership; The Referee further finds that the tax liens as filed were liens against Metals Arts Co., a co-partnership and were not filed or asserted against the bankrupt herein.

Now, Therefore,

It Is Ordered and directed that the Collector of Internal Revenue has no lien against the real property sold by Vance Prather and Virginia Prather to this bankrupt estate by virtue of the fact that this bankrupt estate became at the time of the purchase and recordation of the aforesaid Grant Deed a "purchaser" within the meaning of Section 26 U.S.C.A. 3672a, and that therefore, the said lien of the Federal Government for taxes due from Vance Prather and Virginia Prather for the year 1945, was not good until the recordation of the United States Government lien on November 7, 1947, and that further,

It Is Ordered that the Collector of Internal Revenue has no claim or right in this bankruptcy for the taxes levied against Vance Prather and Virginia Prather for the year 1945, and

It Is Further Ordered that the claim of the Collector of Internal Revenue in the amount of $1,757.82 as a result of this bankrupt's operation under the provisions of Chapter XI, be and the same hereby is allowed as a claim to participate ratably

with other claims arising under Chapter XI operation of this debtor, and is hereby denied any priority whatsoever over any other claims arising in or out of the operation of this debtor under Chapter XI.

It Is Further Ordered that the claims for taxes in the amount of $2,967.06 plus interest, as due from the predecessor partners, the Metals Arts Co., be and the same hereby are allowed as a tax claim within the provisions of Section 64(a)4 of the National Bankruptcy Act, and

It Is Further Ordered and directed that the said claims for taxes from the Metals Arts Co. do not constitute a lien either upon the real property of this bankrupt corporation which has been sold heretofore to the City of Pasadena or a lien upon the proceeds of such sale.

Dated: This 3rd day of March, 1950.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

Approved as to form:

By /s/ EUGENE HARPOLE,
Attorney for Collector of
Internal Revenue.

CRAIG, WELLER &
LAUGHARN,

By /s/ C. E. H. McDONNELL,
Attorneys for Trustee.

[Endorsed]: Filed March 3, 1950.

[Title of District Court and Cause.]

MOTION AND ORDER EXTENDING TIME TO FILE A PETITION FOR REVIEW

Comes Now the United States of America by and through its attorneys Ernest A. Tolin, United States Attorney for the Southern District of California; E. H. Mitchell and Edward R. McHale, Assistant United States Attorneys for said District; Eugene Harpole and James D. Pettus, Special Attorneys for the Bureau of Internal Revenue, and moves the Referee that the time within which the United States or Robert A. Riddell its Acting Collector of Internal Revenue, may file a Petition for Review of the Referee's Order of March 3, 1950, directing that the claim filed by the Collector of Internal Revenue on behalf of the United States in the amount of $1757.82 for withholding taxes due from the bankrupt covering the period of its operations under the provisions of Chapter XI of the Bankruptcy Act participate pro rata with other claims, arising under the Chapter XI operation of the debtor be extended from March 13, 1950, to and including April 17, 1950.

Dated: This 13th day of March, 1950.

ERNEST A. TOLIN,
United States Attorney. [62]

E. H. MITCHELL, and
EDWARD R. McHALE,
Assistant United States
Attorneys,

EUGENE HARPOLE, and
JAMES D. PETTUS,
Special Attorneys, Bureau of
Internal Revenue.
JAMES D. PETTUS,
By /s/ EUGENE HARPOLE,
Attorneys for United States
of America.

It Is So Ordered This 13th day of March, 1950.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed, Referee, March 13, 1950. [63]

[Title of District Court and Cause.]

PETITION FOR REVIEW

Comes Now the United States of America by and through its attorneys Ernest A. Tolin, United States Attorney, for the Southern District of California, E. H. Mitchell and Edward R. McHale, Assistant U. S. Attorneys for said District, and Eugene Harpole, Special Attorney, Bureau of Internal Revenue, and files this petition for review of the order of the Referee entered herein on March 3, 1950, directing that the claim filed on behalf of the United States by the Collector of Internal Revenue for withholding taxes due from the bankrupt in the amount of $1757.82, covering the period of its operations under the provisions of Chapter XI of the Bankruptcy Act, participate pro-rata with

other claims arising under the Chapter XI operations of the debtor, which order reads as follows:

"This matter having come on for hearing on the verified petition of the trustee, Paul W. Sampsell, on January 4, 1950, before the undersigned Referee in Bankruptcy at the hour of 2:00 p.m. thereof, and the trustee having been represented and appeared by and through his counsel, Craig, Weller & Laugharn by Hubert F. Laugharn, and the Collector of Internal Revenue having appeared by and through his counsel Eugene Harpole [64] and evidence both oral and documentary having been educed and submitted to the Court,

"Now, Therefore, the Court makes its Findings of Fact, Conclusions of Law and Orders as follows:

"I.

"The Court finds that it is true that income taxes and interest were due, owing and assessed against Vance Prather and Virginia Prather for the calendar year 1945 each in the sum of $1,967.05; that thereafter said 1945 income taxes were reduced by a recomputation and the allowance of a loss carryback by the Commissioner of Internal Revenue to the sum of $1,037.00, each, plus interest at 6% per annum, or 20c per day, from January 31, 1950, until paid; the Court finds that the Commissioner of Internal Revenue's Assessment List carrying said assessment of 1945 income taxes against Vance Prather and Virginia Prather, was received in the office of the Collector of Internal Revenue at Los Angeles, California, on the fourth day of December,

1946; thereafter notice and demand for the payment of said 1945 income taxes was issued to Vance Prather and Virginia Prather, the taxpayers but said taxes have not been paid. The Collector of Internal Revenue thereafter and on the seventh day of November, 1947, filed notices of liens securing payment of said taxes to the United States in the office of the County Recorder of Los Angeles County, State of California; the Court finds that liens in favor of the United States arose on December 4, 1946, which attached to all property and rights to property, whether real or personal then belonging to the taxpayers, Vance Prather and Virginia Prather, or thereafter acquired by them and said liens became valid as to all the world upon the filing of notice of them on November 7, 1947, in the office of the County Recorder of Los Angeles, State of California.

"II.

"That the taxpayers, Vance Prather and Virginia Prather were the owners of the following described real property on December 4, 1946:

> "Lots 4 to 13, both inclusive of Mrs. Mary R. D. [65] Gifford's Subdivision of Lot 4 in Block A of San Pasqual Tract, in the City of Pasadena, County of Los Angeles, State of California, as per map recorded in book 18, page 75 of Miscellaneous Records, in the office of the County Recorder of said County."

"The said taxpayers, by a grant deed, dated June 27, 1947, and recorded in the office of the County Recorder of Los Angeles County, on July 14, 1947, conveyed said real property to 'Juvenile Products

Company of Pasadena a corporation,' in exchange for that corporation's promise to issue certain shares of its capital stock to the grantors. A permit for the issue of said stock was obtained from the California Corporation Commissioner but none of said stock was ever actually issued to the taxpayers nor were they paid any other consideration of the transfer of said real property to the bankrupt. Vance Prather was the president of said corporation and Virginia Prather its Vice-President at the time of the execution of said grant deed. Both Vance Prather and Virginia Prather knew at the time of the execution of said grant deed that their 1945 income taxes had been assessed, were unpaid and that the Collector of Internal Revenue had demanded payment of said taxes.

"III.

"The Court finds that the sum of $1,757.82, is due and owing as withholding tax arising out of this bankrupt corporation's operation under the provisions of Chapter XI and while within the jurisdiction of this Court; the Court further finds that when wages were paid by this bankrupt corporation during its operation under Chapter XI, the requirements that withholding taxes be withheld and placed in a trust fund were ignored, that is to say, the net amount—i.e. the gross amount of wages, less the amount of withholding tax—was at all times paid; the Court further finds that during the said operation under Chapter XI, this bankrupt corporation at no time had the funds to create or did it create

a separate [66] trust fund composed of that portion of the wages withheld for the payment of withholding taxes.

"The debtor was adjudicated a bankrupt on December 10, 1948. Paul W. Sampsell, as trustee in bankruptcy, received assets from or belonging to the debtor which produced the sum of $46,737.77 in cash (Trustee's First Account).

"IV.

"That the Court finds that certain tax claims on which liens are asserted have been filed by the Collector of Internal Revenue in this proceedings as follows:

"Period	Tax	Total
4-¼-45	Withholding	$ 30.59
4-¼-46	Withholding	802.00
2-¼-47	Withholding	1,308.97
1946	Federal Unemployment	110.90
4-¼-47	Federal Insurance Contribution	708.60

Further interest to accrue on $2,456.81 at 6% per annum from January 31, 1950.

"The Court further finds that the aforesaid liens were on taxes assessed against Metals Arts Co., a co-partnership composed of Vance Prather and Virginia Prather, which co-partnership was a predecessor of the bankrupt corporation here, which bankrupt corporation assumed the liabilities of the said co-partnership; The Referee further finds that

the tax liens as filed were liens against Metals Arts Co., a co-partnership and were not filed or asserted against bankrupt herein.

"Now, Therefore,

"It Is Ordered and directed that the Collector of Internal Revenue has no lien against the real property sold by Vance Prather and Virginia Prather to this bankrupt estate by virtue of the fact that this bankrupt estate became at the time of the purchase and recordation of the aforesaid Grant Deed a 'purchaser' within the meaning of Section 26 U.S.C.A. 3672a, and that therefore, the said lien of the Federal Government [67] for taxes due from Vance Prather and Virginia Prather for the year 1945, was not good until the recordation of the United States Government lien on November 7, 1947, and that further,

"It Is Ordered that the Collector of Internal Revenue has no claim or right in this bankruptcy for the taxes levied against Vance Prather and Virginia Prather for the year 1945, and

"It Is Further Ordered that the claim of the Collector of Internal Revenue in the amount of $1,757.82 as a result of this bankrupt's operation under the provisions of Chapter XI, be and the same hereby is allowed as a claim to participate ratably with other claims arising under Chapter XI operation of this debtor, and is hereby denied any priority whatsoever over any other claims arising in or out of the operation of this debtor under Chapter XI.

"It Is Further Ordered that the claims for taxes in the amount of $2,967.06 plus interest, as due from the predecessor partners, the Metals Arts Co., be and the same hereby are allowed as a tax claim within the provisions of Section 64(a)4 of the National Bankruptcy Act, and

"It Is Further Ordered and directed that the said claims for taxes from the Metals Arts Co. do not constitute a lien either upon the real property of this bankrupt corporation which has been sold heretofore to the City of Pasadena or a lien upon the proceeds of such sale.

"Dated: This 3rd day of March, 1950.

BENNO M. BRINK,
Referee in Bankruptcy."

The petitioner alleges that the Referee in Bankruptcy erred in the following particulars in the making of said order of March 3, 1950:

1) The Referee in Bankruptcy erred in his Order of March 3, 1950, in failing to hold that all of the assets of the debtor, Juvenile Products of Pasadena, a corporation, which the trustee in bankruptcy received were constructively impressed with the trust provided by Section 3661 of the Internal Revenue Code for withholding taxes withheld [68] from wages paid by the debtor while operating under the jurisdiction of the court in a Chapter XI proceeding immediately prior to its adjudication as a bankrupt.

2) That the Referee in Bankruptcy erred in his Order of March 3, 1950, in holding that the claim presented by the Collector of Internal Revenue in the amount of $1757.82, covering Federal Withholding taxes withheld by the bankrupt from the wages paid its employees while said bankrupt was operating under the provisions of Chapter XI of the Bankruptcy Act, must participate ratably with other claims arising under the Chapter XI operations of the debtor preceding its adjudication as a bankrupt.

3) That the Referee in Bankruptcy erred in adopting his Finding of Fact No. 2, in that he should have determined that during the time said bankrupt operated under Chapter XI of the Bankruptcy Act, it followed the consistent practice of, in effect, using the taxes withheld from the wages of its employee in one week to pay the wages or take-home pay of its employees in the succeeding weeks of its operation, and that it did have at the time funds with which to create the trust required by Section 3661 of the Internal Revenue Code with respect to taxes withheld from the wages of employees.

Dated: April 14, 1950.

ERNEST A. TOLIN,
United States Attorney.

E. H. MITCHELL, and
EDWARD R. McHALE,
Assistant U. S. Attorneys.

EUGENE HARPOLE,
Special Attorney, Bureau of
Internal Revenue.

By /s/ EUGENE HARPOLE,
Attorneys for Collectors of
Internal Revenue.

Affidavit of Service by Mail attached.

[Endorsed]: Filed, Referee, April 17, 1950. [69]

SUPPLEMENT TO REFEREE'S CERTIFICATE ON PETITION FOR REVIEW OF ORDER IN RE CLAIM OF COLLECTOR OF INTERNAL REVENUE FOR WITHHOLDING TAXES

To The Honorable William C. Mathes, Judge of the Above-Entitled Court:

Pursuant to the request of counsel for the United States of America, I, Benno M. Brink, one of the Referees in Bankruptcy of said Court, before whom the above entitled matter is pending under an order of general reference, do hereby supplement my Referee's Certificate on Petition for Review of Order in re Claim of Collector of Internal Revenue for Withholding Taxes, filed herein on the 19th day of May, 1950, by transmitting herewith the following additional papers, to wit:

1. Photostat of First Report of Trustee and Petition for Distribution, filed May 14, 1949.

2. Objections to claim of H. B. Kelley, filed October 22, 1949.

3. Order appointing H. B. Kelley as Disbursing Officer upon Confirmation of Arrangement, filed June 10, 1948. [71]

4. Order Terminating Liability of Surety on Bond of H. B. Kelley as Disbursing Officer, filed August 10, 1949.

5. Request for Inclusion of Documents in Referee's Certificate on Review, filed May 15, 1950.

Respectfully submitted this 6th day of June, 1950.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed U.S.D.C., June 6, 1950. [72]

[Title of District Court and Cause.]

FIRST REPORT OF TRUSTEE AND PETITION FOR DISTRIBUTION (NOT FINAL)

To Honorable Benno M. Brink, Referee in Bankruptcy:

Comes now Paul W. Sampsell, the Trustee herein, and respectfully represents that the above bankrupt originally filed a Debtor's proceeding herein on April 6, 1948, but that the business did not prosper, and further obligations were incurred, and adjudi-

cation was, therefore, entered and your Trustee directed to liquidate the estate. A bond of Ten Thousand Dollars ($10,000.00) was filed as requested and said bond was thereafter approved.

That this concern was engaged in business at 81 Masonic Court, Pasadena, said building being in the rear and fronting on an alley North of Colorado Boulevard, and West of Fair Oaks in Pasadena. That the property occupied a large building with a great deal of floor space, but it was a very old building, and at what appeared to be a very high rental.

Your Trustee immediately took possession and compiled an inventory as shown by the files herein, which said inventory disclosed the following:

	Inventory	Appraisal
Merchandise	$ 669.65	$ 300.00
Supplies	1,630.65	400.00
Machinery	9,984.75	2,250.00
Office Furniture and Fixtures	928.00	500.00
Lease Contracts:		
1 Crescent Planer		
Cost $2,661.69		
Due 825.00 Equity	1,836.69	175.00
1 Mock Rip Saw		
Cost $ 760.00		
Due 352.80 Equity	407.20	25.00
Dodge Truck (on premises)		
Value $1,150.00		
Due 933.44 Equity	216.56	No value
Machinery (Located at 1111 Mentone)	2,385.00	1,000.00
Total	$18,058.50	$4,650.00

That said inventory was totally liquidated after suitable advertisement, as disclosed by the files of the estate and the attached account of the Trustee.

Real Estate

That the bank set forth the certain real property in the City of Pasadena, consisting of vacant property in the commercial area of Pasadena, and lying directly opposite the warehouse of the City of Pasadena. Said property had various encumbrances against it, and after wide advertisement, it was apparent that the City of Pasadena was quite anxious to acquire the property as a yard for telephone poles and other personal property. After long negotiation a sale was made to the City of Pasadena for $36,000.00. That the appraisal on said property was $33,000.00. That said property had as a lien a claim of one A. V. Nast, and that it is necessary that the validity and amount of said lien be determined.

That the escrow of sale has been closed, as disclosed by the attached account.

That the bank scheduled various Accounts Receivable, all of which have received the careful consideration of the Trustee, and a considerable amount of money collected. That under Order of Court [74] the Accounts Receivable are now in the hands of G. E. Preston, an experienced collector, under the terms of an order entered herein and as disclosed by the files of this estate.

That your Trustee has prepared a list of the obligations incurred after the date of bankruptcy and

under an Order of Court has paid a dividend therein, as directed by your Honor.

That your Trustee believes that a hearing should be had on this First Report and that such amount as may be now properly payable be discharged. That your Trustee requests that compensation be allowed the Trustee by reason of the services rendered herein, and as disclosed by the files of this estate total receipts in the sum of $46,737.77, which said compensation amounts to $607.37.

Wherefore, your Trustee prays that an Order be made, allowing and approving his report and account, and directing such pro rata payments as may be found proper.

Respectfully submitted,

/s/ PAUL W. SAMPSELL,
Trustee.

CRAIG, WELLER &
LAUGHARN

By.....
Attorneys for Trustee. [75]

Exhibit "A"

Receipts:

12/22/48:		
H. B. Kelley, Disbursing Agent		
Balance from fire losses	$974.67	
Receipts from sales	131.23	$1,105.90
12/22/48:		
Cash Sales, sand boxes, toy chests		28.00
12/30/48:		
David Weisz		
Sale of assets		4,300.00
12/30/48:		
Snutt and Crawford		
Return premium on Insurance		77.61
1/17/49:		
Bank of America, Pasadena		
Balance in Bank		591.03
Collections of Accounts Receivable, as itemized in Exhibit "B," attached hereto		4,635.23
5/ 6/49:		
City of Pasadena		
Deposit on bid of $36,000.00		3,600.00
8/31/49:		
Title Insurance and Trust Company		
Sale through Escrow		
Balance sale price		32,400.00
Total Receipts		$46,737.77

Disbursements:

12/31/48:		
Mame B. Beatty, County Recorder		
Recording order approving Trustee's Bond	$ 1.60	
12/31/48:		
Frank Poole		
Services re assets, 12/10—12/28/48		
100 hrs. at $1.75	$175.00	
Total expense	16.94	191.94
12/31/48:		
Chas. W. Sheely, Services re sale inventory, 12/13—12/48/48		
89½ hrs. at $1.75	156.63	
240 miles at $0.06	14.40	
Phone calls	1.80	172.83

Disbursements—(Continued):

12/31/48:		
Los Angeles Daily Journal		
Advertising sale		7.60
12/31/48:		
Mrs. Florence Miller		
Services re accounts receivable		
3 days at $50.00 per week		30.00
12/31/48:		
Los Angeles Stenographic Service		
Mimeographing and mailing notices of sale		44.14
12/31/48:		
G. E. Preston, Services re accounts receivable, 12/13—12/23/48		
60 hours at $1.75	100.50	
24 miles at $0.06	8.64	109.14
1/ 6/49:		
William A. Wylie, Services re Court sale, 12/8—12/27/48		
20 hours at $1.75	35.00	
Carfare	1.00	36.00
1/12/49:		
Los Angeles Times		
Advertising sale		58.80
1/18/49:		
Los Angeles Stenographic Service		
Multigraphing and sending out list of Administration Obligations		25.18
1/20/49:		
W. W. Freeman Detective Agency		
Services re nite patrol December 1948		8.00
2/ 2/49:		
E. B. Bowman		
Reporter's services 6/25/48—1/31/49		80.00
2/ 7/49:		
Los Angeles Examiner		
Advertising sale		37.38
2/ 7/49:		
Clifton Clay, copy of deposition of:		
Vance Prather	5.00	
Mrs. Virginia McDonald	10.80	
A. D. Nast	5.00	20.80

Disbursements—(Continued):

2/ 7/49:
Pasadena Star News
Advertising sale 11.76

2/ 7/49:
G. E. Preston
Services re collection of accounts receivable, 1/3—1/27/49
16 hours at $1.75 ..... 28.00
21 miles at $0.06 ..... 1.26 29.26

2/ 7/49:
William A. Wylie, Services re claims, 1/12—1/29/49
9 hours at $1.75 ..... 15.75
Carfare ..... .40 16.15

2/ 9/49:
A. D. Bond Agency
Insurance—stock, equipment .....$ 72.79
Truck 3.36
Burglary 5.00 81.15

2/10/49:
St. Paul Mercury Indemnity Company
Premium on Trustee's Bond 40.00

2/28/49:
Bruce Hudson Transfer
Picking up and delivery of records..... 15.45

2/28/49:
Denis A. Lyons
Service of subpena 14.96

2/28/49:
Chas. W. Sheely, Services re claim of Benner and accounts receivable, 2/16/49 to 2/17/49
6 hours at $1.75 ..... 10.50 10.50

3/ 2/49:
G. E. Preston, Services re accounts receivable, 2/16/49
4 hours at $1.75 ..... 7.00

3/31/49:
G. E. Preston, Services re accounts receivable, 3/14/49
4 hours at $1.75 ..... 7.00
21 miles at $0.06 per mile..... 1.26 8.26

Disbursements—(Continued):

4/18/49:		
Charles W. Shelly, Services re checking Benner claim, 3/30—4/6/49		
10 hours at $1.75		17.50
4/26/49:		
G. E. Preston, Services re making exhibits of accounts receivable, as per order of court		
4 hours at $1.75		7.00
4/26/49:		
Title Insurance & Trust Company		
Services re title report		18.75
4/26/49:		
E. B. Bowman		
Reporter's services 2/23, 3/16, 30 and 4/16		25.00
4/28/49:		
Pasadena Star-News		
Notice of hearing on sale of real estate		59.38
5/ 2/49:		
Howard B. Benner		
Payment of claim, as per court order 4/11/49		4,297.35
5/ 2/49:		
Los Angeles Stenographic Service		
Mimeographing and mailing notices of sale		22.10
5/10/49:		
Southern California Gas Company		
Closing bill		14.40
5/18/49:		
City of Pasadena		
Closing light and water bill		36.72
5/23/49:		
William A. Wylie, services re claims		
2/11—4/30/49	24.50	
Carfare	1.00	25.50
6/15/49:		
First Dividend of 15% on Chapter XI claims as per Distribution Sheet of Juvenile Products	2,108.74	
Less Southern California Gas Company claim paid in full	2.16	2,106.58
6/21/49:		
E. B. Bowman		
Reporter's fees 5/4, 5/24, 6/8/49		15.00

Disbursements—(Continued):

6/30/49:			
William A. Wylie, services re escrow sale of real property, 5/11—6/11/49			
21 hours at $1.75	36.75		
Expense	2.00	38.75	
6/30/49:			
G. E. Preston, commissions on collections:			
50% Edna's Gift Shop—$25.00	12.50		
33⅓% Sears Roebuck—$114.86	38.29	50.79	
9/ 9/49:			
G. E. Preston, 50% commission on collections:			
Edna's Gift Shop—$12.40	6.20		
$10.00	5.00		
George Smith Company—$73.80	36.90	48.10	
8/31/49:			
Paid through escrow			
Title Insurance and Trust Company			
Policy of Title Insurance	110.00		
Escrow fee	30.50		
Recording Reconveyances (2)	4.00		
Recording Releases (2)	4.00		
Paid County tax sale	1,197.80		
Paid City tax sale	279.39		
Weed assessment credit	63.20		
Adjust taxes County	72.96		
Adjust taxes City	24.02		
Commission	1,500.00		
Paid estate Ethel Bateman	7,621.05		
Interest on $7,161.52 at 6% from 12/10/48—8/26/49	305.55		
Pay estate of Wm. E. Easterbrook, deceased	9,436.47		
Interest on $8,867.47 at 6% from 12/10/48—8/26/49	378.34		
Reconveyance fees (2)	7.00		
Trust deed foreclosure fees	119.72	21,154.00	28,994.82
Balance Cash on Hand, 10/6/49			$17,742.95

Fees and Allowances to Be Made:

Trustee's fee on account	$
Trustee's expense, Dec., 1948, through Sept., 1949	$226.49
Fee of attorney for Trustee, on account	$
Referee's Salary Fund	$
Referee's Expense Fund	$

Exhibit "B"

Collections of Accounts Receivable:

12/22/48:		
Babytown Stores	$ 97.60	
Bon Ton Kiddie Shop	47.81	
Brown Dunkin	78.20	
Cindrella Shop	97.61	
Cozzett's	18.43	
Feline's	867.30	
Hadley's	17.64	
Harbour Longmire	89.34	
The Harris Company	11.76	
Herman's Department Store	48.80	
Holiday Hardware Company	72.32	
Indiana Jobbing & Mercantile	222.26	
Jacob Mange	63.50	
Lobel's Youth Center	42.34	
Madigan's	48.80	
Harry S. Manchester	48.80	
Piser	103.07	
Richard Store Co.	89.96	
Senger Dry Goods Co.	69.38	
Gunner A. Smidt	97.61	
Hartegan's	55.97	
Ridgewood Hardware	118.19	
Tinytown	11.76	
J. L. Hudson Co.	110.54	
Hurley Jones Company	61.74	$2,590.73
12/30/48:		
Maison Blanche	$123.48	
Famous Barr Company	127.01	
Asahi Shoe and Dry Goods	28.22	278.71
1/ 3/49:		
J. F. Stampfer Company	56.24	
Harry S. Manchester, Incorporated	61.73	
The Circus Shops	111.60	
Leona Clark Children's Shop	49.80	
Chandler and Company, Incorporated	124.66	
Hutzler Brothers Company	146.41	
Denholm and McKay Company	97.61	
Hush-A-Bye House	49.80	
Scranton Dry Goods Company	39.61	737.46

1/10/49:		
Neil Gammon's Baby Dept. Store	52.92	
Eve Young	43.20	
The Scamper Shop	51.74	
Humpty-Dumpty	35.28	
Jack & Jill Shoppe	49.80	232.94
1/17/49:		
Pfeifer's Toy Shop	15.68	
Kiddy Center	49.80	
Children's Department Stores	80.09	145.57
1/21/49:		
Kiddie Towne	90.30	
C. K. Whitner Company	35.28	125.58
1/28/49:		
Kay and Malnick		25.00
2/ 2/49:		
Hale Brothers Stores, Inc.		69.38
2/ 8/49:		
William Feline's		72.00
4/28/49:		
Frederick's Baby & Children's Shop		61.80
6/30/49:		
Sears Roebuck	114.86	
Edna's Gift Shop	25.00	139.86
7/21/49:		
Western Toy and Baby Shop		60.00
8/10/49:		
Edna's Gift Shop		10.00
8/12/49:		
Edna's Gift Shop		12.40
9/20/49:		
George C. Smith Company		73.80
Total Collections		$4,635.23

Exhibit "C"

Itemization of Trustee's Cash Advanced Account:

The actual cash advanced from personal funds for bookkeeping, stenographic and clerical work, postage and miscellaneous items in this estate, for which reimbursement is claimed in the foregoing account is as follows:

Month	Bookkeeping, Stenographic & Clerical Services	Postage	Telephone & Miscellaneous	Total
1948				
December	$37.35	$2.02	.....	$39.37
1949				
January	26.40	3.88	$2.02	32.30
February	22.50	.90	1.40	24.80
March	12.30	.39	1.45	14.14
April	11.60	.39	.55	12.54
May	24.70	1.26	2.42	28.38
June	37.55	.52	2.00	40.07
July	7.55	1.05	.50	9.10
August	3.63	.12	.....	3.75
September	21.77	.12	.15	22.04
Total Expense Through September, 1949				$226.49

[Endorsed]: Filed, Referee, November 14, 1949.

[Title of District Court and Cause.]

OBJECTIONS TO CLAIM OF H. B. KELLEY

Comes now Paul W. Sampsell, trustee for the within bankrupt estate, and objects to the allowance of the claim of H. B. Kelley in the amount of $955.50, and as and for his grounds of objection thereto alleges as follows:

I.

That the within bankruptcy proceedings were filed under the provisions of Chapter XI of the Bankruptcy Act on April 6, 1948, That the Plan of Arrangement was confirmed on July 24, 1948.

II.

That thereafter it was discovered that the business of the bankrupt was operating at a huge loss and an order of adjudication was made on December 10, 1948.

III.

Your trustee alleges that in excess of $15,000 of new obligations were incurred subsequent to the filing of the bankruptcy proceedings and were not paid by the debtor in its operations and now remain unpaid.

IV.

That your trustee alleges that the operation of the debtor [84] in this proceeding has created a situation in this estate wherein the creditors existing as of the date of the filing of the proceedings have suffered a loss of in excess of $15,000 all because of the acts of the officers of the bankrupt and the claimant herein.

V.

Your trustee further alleges that the officers of the bankrupt and the claimant were instructed to file reports with the Referee and report to the Referee their unpaid bills and the progress of their operations. That they did not comply with the instructions of the Referee and permitted large obligations to be incurred and remain unpaid all to the detriment of the creditors herein. Your trustee alleges that the said H. B. Kelley permitted the matter to run along without the payment of his salary.

VI.

That if he had reported the situation to the Referee, the Referee would have terminated the operation. That there was no operation during the period, or profit.

VII.

That the said claimant was employed in lieu of a disbursing agent and as such was an officer of the Court herein and was under the further duty to keep the Court informed of the true situation and make the reports herein as required by the order of the Court, and the Court was not informed of the true condition of the debtor over a period of many weeks.

VIII.

At the time of the appointment of the said H. B. Kelley herein it was anticipated that he would be paid currently, and your trustee further alleges that there was very little, if any, consideration rendered to the administration herein upon behalf of the said claimant and further in no event would the said claimant be entitled to full payment of his said claim herein.

Wherefore, your trustee prays that the said claim be disallowed.

/s/ PAUL W. SAMPSELL.
Trustee. [85]

To The Above Creditor, H. B. Kelley, and William E. Prather, His Attorney:

You Are Hereby Notified that the Trustee in Bankruptcy herein has made and filed herein his written objections to claim as hereinbefore set forth, and the same have been set for hearing before the Honorable Benno M. Brink, Referee in Bankruptcy in the Federal Building, Los Angeles, California, on the 1st day of November, 1949, at the hour of 10 a.m. thereof.

Dated: October 20, 1949.

CRAIG, WELLER & LAUGHARN,

By /s/ HUBERT F. LAUGHARN,
Attorneys for Trustee.

[Endorsed]: Filed Referee, October 22, [86] 1949.

[Title of District Court and Cause.]

ORDER APPOINTING H. B. KELLEY AS DISBURSING OFFICER UPON CONFIRMATION OF ARRANGEMENT

It Appearing to the Court that H. B. Kelley was nominated as Disbursing Officer to receive and to disburse all funds required to be received and deposited upon the confirmation by this Court of the arrangement of Juvenile Products of Pasadena, a Corporation, Debtor; and

It Further Appearing to the Court that said H. B.

Kelley resides in the County of Los Angeles within the Southern District of California, Central Division, is competent and a qualified person so to act, and that it is for the best interests of all parties to these proceedings that he be so appointed;

It Is Hereby Ordered that H. B. Kelley be and he is hereby appointed by this Court as Disbursing Officer to and that he shall

(a) Collect and receive all monies and funds to pay in cash in full all costs of administration in these proceedings as fixed and determined by order of this Court; to pay to all valid claims of Juvenile Products of Pasadena, a Corporation, Debtor, entitled to priority, which have not been waived as to immediate payment and to pay said valid prior claims the amounts of immediate payment required as under [87] the terms of their respective written waivers as in said respective written waivers set out; and to pay to the unsecured creditors of said Debtor, after their claims have been finally fixed and determined, upon the first day of the month following the confirmation by this Court of said Debtor's arrangement an amount pro rata of 10% of the amounts received by it from its sales as the claim of said unsecured creditor bears to the total amount of the claims of all other said unsecured creditors and to pay said pro rata of said 10% of said receipts from its sales regularly on or before the 1st day of each calendar month thereafter until the full amount of the claim of each unsecured creditor has been paid in full together with interest at the rate of 6% per annum from

the date of confirmation of Debtor's arrangement until paid.

(b) Keep records and accounts of all monies received and disbursed in paragraph (a) immediately above set out, make such reports in writing to this Court as this Court may require, and to furnish such information as to said receipts and disbursements as may be requested by parties in interest.

That upon qualifying as Disbursing Officer herein he shall file a bond of a reputable surety company in the sum of $2,500.00.

Done this 10th day of June, 1948.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed, Referee, June 10, 1948. [88]

[Title of District Court and Cause.]

ORDER TERMINATING LIABILITY OF SURETY ON BOND OF H. B. KELLEY AS DISBURSING OFFICER

It appearing that H. B. Kelley was heretofore appointed as Disbursing Officer in this proceeding and that on December 22, 1948, subsequent to the appointment of Paul W. Sampsell as Trustee in Bankruptcy herein, the said H. B. Kelley, as Disbursing Officer, filed his report in this proceeding, now, therefore, good cause appearing therefor and upon the undersigned Referee's own motion,

It is ordered that the Surety on the bond heretofore given in this matter by the said H. B. Kelley, as Disbursing Officer herein, shall have no liability under the said bond for any act or omission of the said H. B. Kelley, as Disbursing Officer in this matter, subsequent to the 22nd day of December, 1948.

Dated: August 10, 1949.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed, Referee, August 10, [89] 1949.

[Title of District Court and Cause.]

ORDER ON REVIEW OF REFEREE'S ORDER OF MARCH 3, 1950

Upon the petition for review filed April 17, 1950, by the Collector of Internal Revenue; upon the certificate of Referee Benno M. Brink; upon the proceedings had before the Referee as appear from his certificate and supplemental certificate; and upon hearing counsel for the parties; and it appearing to the court:

(a) that the amount of withholding taxes [26 U.S.C. § 1622] and Federal Insurance Contributions taxes [26 U.S.C. § 1400] collected or withheld by the debtor in possession under a Chapter XI plan of arrangement [Bankruptcy Act § 342, 11 U.S.C. § 742] "shall be held to be a special fund

in trust for the United States" [26 U.S.C. § 3661, see 26 Code Fed. Regs. § 405.605 (1949)];

(b) that the Collector of Internal Revenue has the burden of tracing the amounts so collected and withheld which he claims constitute a trust fund [In re Independent Automobile Corp., 118 F. 2d 537. [91] 539 (2d Cir. 1941): In re Frank, 25 F. Supp. 1005 (S.D.N.Y. 1939): 3 Scott on Trusts 2498. 2507 (1939 ed.)];

(c) that the taxes so collected and withheld constitute "debts contracted . . . after the confirmation of an arrangement" [Bankruptcy Act § 64(b), 11 U.S.C. § 104(b): cf. § 64a(4). 11 U.S.C. § 104a(4): Vogel v. Mohawk Electric Sales Co., 126 F. 2d 759 (2d Cir. 1942)];

It Is Ordered that the Referee's order filed March 3. 1950. be and is hereby confirmed.

It Is Further Ordered that the Clerk this day serve copies of this order by United States mail on

(1) Referee Benno M. Brink:

(2) Attorney for the Trustee: and

(3) Attorney for the Collector of Internal Revenue.

September 30, 1950.

/s/ WM. C. MATHES,
United States District Judge.

Judgment entered Oct. 5, 1950.

[Endorsed]: Filed, U.S.D.C., October 2, [92] 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the United States of America hereby appeals to the Court of Appeals for the Ninth Circuit from the order of the United States District Court for the Southern District of California dated September 30, 1950, which confirms the order of the Referee in Bankruptcy of March 3, 1950, wherein it was ruled and ordered that the claim of the Collector of Internal Revenue in the amount of $1750.82 for Federal withholding tax arising as a result of the bankrupt's operations under the provisions of Chapter XI of the Bankruptcy Act was allowed to participate only ratably with other claims arising under Chapter XI operations of said debtor, and was denied any priority whatsoever over any other claims arising in or out of the operation of said debtor under Chapter XI. The order appealed from was filed October 2, 1950.

Dated: October 27, 1950.

ERNEST A. TOLIN,
United States Attorney.

E. H. MITCHELL, and
EDWARD R. McHALE,
Assistant U. S. Attorneys.

EUGENE HARPOLE, and
FRANK W. MAHONEY,
Special Attorneys,
Bureau of Internal Revenue.

By /s/ EUGENE HARPOLE,
Attorneys for Appellant.

[Endorsed]: Filed, U.S.D.C., October 27, [93] 1950.

[Title of District Court and Cause.)

APPELLANT'S STATEMENT OF POINTS TO BE URGED UPON APPEAL

To Paul W. Sampsell, Trustee in Bankruptcy of Juvenile Products of Pasadena, a Corporation, and Craig, Weller and Laugharn, His Attorneys:

You, and Each of You, Will Please Take Notice that under the provisions of Rule 75 of the Rules of Civil Procedure of the District Court of the United States, the appellant intends to rely upon the following points in the appeal of the above-entitled case:

1. The District Court erred in confirming the Referee in Bankruptcy's Order of March 3, 1950.

2. The District Court erred in its Order of September 30, 1950, in failing to hold that all of the

assets of the debtor, Juvenile Products of Pasadena, a corporation, which the trustee in bankruptcy received were constructively impressed with the trust provided by Section 3661 of the Internal Revenue Code for withholding taxes withheld from wages paid by the debtor while operating under the jurisdiction of the District Court in a Chapter XI proceeding immediately prior to its [94] adjudication as a bankrupt.

3. The District Court erred in its Order of September 30, 1950, in confirming the Order of the Referee in Bankruptcy of March 3, 1950, and thereby holding that the claim presented by the Collector of Internal Revenue in the amount of $1,757.82 covering federal withholding taxes withheld by the bankrupt from the wages paid its employees while said bankrupt was operating under the provisions of Chapter XI of the Bankruptcy Act must participate ratably with other claims arising under the Chapter XI operations of the debtor proceeding its adjudication as a bankrupt.

4. The District Court erred in confirming the Referee in Bankruptcy in the latter's failure to hold that the bankrupt during the time it operated under Chapter XI of the Bankruptcy Act had the funds with which to create the trust required by Section 3661 of the Internal Revenue Code with

respect to taxes withheld from the wages of its employees.

Dated: This 17th day of November, 1950.

ERNEST A. TOLIN,
United States Attorney.

E. H. MITCHELL, and
EDWARD R. McHALE,
Assistant United States Attorneys.

EUGENE HARPOLE, and
FRANK W. MAHONEY,
Special Attorneys, Bureau of Internal Revenue.

By /s/ EUGENE HARPOLE,
Attorneys for United States of America.

Receipt of copy acknowledged.

[Endorsed]: Filed, U.S.D.C., November 17, [95] 1950.

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF THE RECORD ON APPEAL

To the Clerk of the Above-Entitled Court:

You are hereby requested to include in the Record of Appeal from the Order of the District Court dated September 30, 1950, the following:

1. Petition and State of Affairs, filed April 6, 1948.

2. Approval of Petition and Order of Reference, filed April 6, 1948.

3. Order Confirming Arrangement, filed July 27, 1948.

4. Order of Adjudication, filed December 13, 1948.

5. Petition for Order to Show Cause, filed December 16, 1949.

6. Order to Show Cause, filed December 16, 1949.

7. Findings of Fact and Order, filed March 3, 1950.

8. Motion and Order Extending Time to File Petition on Review, filed March 13, 1950.

9. Petition for Review, filed April 17, 1950.

10. Referee's Certificate on Petition for Review, filed May 19, 1950.

11. Request for Inclusion of Documents in Referee's Certificate, filed May 15, 1950. [97]

12. Supplement to Referee's Certificate, filed June 6, 1950.

13. Order on Review of Referee's Order of March 3, 1950, filed October 2, 1950.

14. Certified Copy of Bond of H. B. Kelley in sum of $2,500.00, filed June 11, 1948.

15. Notice of Appeal, filed October 27, 1950.

16. Appellant's Statement of Points to Be Urged Upon Appeal.

17. This Designation.

Dated: This 17th day of November, 1950.

ERNEST A. TOLIN,
United States Attorney.

E. H. MITCHELL, and
EDWARD R. McHALE,
Assistant United States Attorneys.

EUGENE HARPOLE, and
FRANK W. MAHONEY,
Special Attorneys, Bureau of Internal Revenue.

By /s/ EUGENE HARPOLE,
Attorneys for United States of America.

Receipt of copy acknowledged.

[Endorsed]: Filed, U.S.D.C., November 17, [98] 1950.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET CAUSE ON APPEAL

Pursuant to Rule 73(g) Federal Rules of Civil Procedure, and Good Cause appearing therefor,

It Is Hereby Ordered that the time within which to file the record and docket the above-entitled cause in the United States Court of Appeals for the Ninth Circuit be, and the same is hereby extended to and including January 25, 1951.

Dated: This 17th day of November, 1950.

/s/ WM. C. MATHES,
United States District Judge.

[Endorsed]: Filed, U.S.D.C., November [100] 17, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 100, inclusive, contain the original Petition for An Arrangement Under Chapter XI of the Bankruptcy Act together with Schedules and Statement of Affairs; Approval of Debtor's Petition and Order of Reference; Bond of H. B. Kelley, Disbursing Officer; Certified Copy of Order Confirming Arrangement of Debtor Under

Chapter XI of the Bankruptcy Act; Order of Adjudication; Referee's Certificate on Petition for Review of Order in re Claim of Collector of Internal Revenue for Withholding Taxes; Petition for Order to Show Cause and for an Order to Restore Order to Show Cause to Calendar; Order to Show Cause and Order to Restore Order to Show Cause to Calendar; Findings of Fact and Order on Order to Show Cause; Motion and Order Extending Time to File Petition for Review; Petition for Review; Supplement to Referee's Certificate on Petition for Review of Order in re Claim of Collector of Internal Revenue for Withholding Taxes; Photostatic copy of First Report of Trustee and Petition for Distribution; Objections to Claim of H. B. Kelley; Order Appointing H. B. Kelley as iDsbursing Officer upon Confirmation of Arrangment; Order Terminating Liability of Surety on Bond of H. B. Kelley as Disbursing Officer; Request for Inclusion of Documents in Referee's Certificate on Review; Order on Review of Referee's Order of March 3, 1950; Notice of Appeal; Statement of Points on Appeal; Designation of Record on Appeal and Order Extending Time to Docket Appeal which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 15 day of January, A.D. 1951.

EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12811. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Paul W. Sampsell, Trustee in Bankruptcy of the Estate of Juvenile Products of Pasadena, a corporation, bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed January 16, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 12,811

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate of Juvenile Products of Pasadena, a corporation, Bankrupt,

Appellee.

Appeal from the United States District Court for the for the Southern District of California.

BRIEF FOR THE UNITED STATES.

THERON LAMAR CAUDLE,
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ELLIS N. SLACK,
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600 Federal Building,
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Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

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TABLE OF AUTHORITIES CITED

CASES

STATUTES

No. 12,811

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate of Juvenile Products of Pasadena, a corporation, Bankrupt,

Appellee.

BRIEF FOR THE UNITED STATES.

Opinions Below.

The only opinion rendered by the District Court is contained in its unreported order on review of the order of the Referee in Bankruptcy. [R. 79-80.] The only opinion rendered by the Referee in Bankruptcy is contained in his certificate to the District Court on the petition to review his order [R. 37-41] and is likewise unreported.

Jurisdiction.

This proceeding arose in the District Court for the Southern District of California, upon a petition for an arrangement under Chapter XI of the Bankruptcy Act, as amended, by Juvenile Products of Pasadena, a California corporation, with its principal place of business at

Pasadena, California [R. 3-8], which was filed on April 6, 1948. [R. 21.] An order approving the petition as one for relief under Section 322 of the Bankruptcy Act, and referring the matter to Benno M. Brink, one of the referees in bankruptcy, was entered on the same date. [R. 21-22.] Jurisdiction of the court below is conferred by Section 2 of the Bankruptcy Act, as amended, and Section 24, Nineteenth of the Judicial Code. Under date of July 24, 1948, the Referee in Bankruptcy entered an order confirming the arrangement of the debtor under Chapter XI of the Bankruptcy Act, as amended. [R. 25-35.] Thereafter, under date of December 13, 1948, the Referee entered an order under the provisions of Section 377(2) of Chapter XI of the Bankruptcy Act, adjudging the debtor, Juvenile Products of Pasadena, a bankrupt, and that bankruptcy be proceeded with pursuant to the provisions of the Bankruptcy Act. [R. 36.] Under date of March 3, 1950, the Referee entered an order which allowed the claim of the Collector of Internal Revenue in the amount of $1,757.82 as a result of the bankrupt's operation under the provisions of Chapter XI, and as a claim to participate ratably with other claims arising under Chapter XI operation of the debtor, but denied the claim of the Collector of Internal Revenue any priority whatsoever over any other claims arising in or out of the operation of the debtor under Chapter XI. [R. 46-51.] Following an extension of time from March 13, 1950, to and including April 17, 1950, granted therefor by the Referee [R. 52-53], a petition for review of the order of the Referee entered March 3, 1950, was duly filed by the United States on April 17, 1950. [R. 53-61.] On September 30, 1950, the District Court made an order on review of the Referee's order of March 3, 1950, con-

firming the Referee's order, which order of the District Court was filed on October 2, 1950. [R. 79-80.] Notice of appeal from this order of the District Court was duly filed by the United States on October 27, 1950, pursuant to Section 25(a) of the Bankruptcy Act, as amended. [R. 81-82.] Jurisdiction of this court to hear and determine this appeal is conferred by Section 24(a) of the Bankruptcy Act, as amended, and 28 U. S. C., Section 1291.

Questions Presented.

1. Whether the assets of the estate, continuously after the filing of the Arrangement Petition, were adequate to create a trust to cover the amount of the disputed taxes withheld, even though not in cash funds.

2. Whether a bankruptcy court, as a court of equity, will require the administration of an estate under its control to comply with Section 3661 of the Internal Revenue Code and accordingly direct its court officers to segregate, in trust for the United States, estate assets sufficient to pay withholding taxes deducted from wages and distribute to the United States as trust beneficiary the amount of the trust fund so segregated, making further tracing of a trust fund unnecessary.

3. Whether, in any event, the trust fund can here be traced into the bankrupt estate.

Statutes and Regulations Involved.

The pertinent provisions of the Bankruptcy Act, Internal Revenue Code and Treasury Regulations are printed in the Appendix, *infra*.

Statement.

This is an appeal by the United States [R. 81] from an order of the District Court [R. 79-80], confirming an order of the Referee in Bankruptcy. In his order, so far as pertinent, the Referee in Bankruptcy had passed upon a claim by the Collector of Internal Revenue for withholding taxes amounting to $1,757.82, which had arisen in the course of the bankrupt's operations, as debtor in possession under an Arrangement Proceeding (Chap. XI of the Bankruptcy Act) and while within jurisdiction of the District Court. [R. 48-49.] The Referee's order denied any priority to this claim of the Collector over any other claims arising in the course of the bankrupt's operations as debtor in possession, though allowing the Collector's claim as a claim to participate ratably with other claims arising out of the bankrupt's operations under the Arrangement Proceeding as debtor in possession. [R. 50-51.]

On April 6, 1948, Juvenile Products of Pasadena, a California corporation—as debtor—filed in the court below a petition in proceedings for an Arrangement, pursuant to Chapter XI, Section 322 of the Bankruptcy Act as amended. [R. 3-21, 37.] On the same day the court below approved this petition and made a general order of reference to Benno M. Brink, one of the referees in bankruptcy. [R. 21-22.]

On July 24, 1948, the Referee made an order confirming the proposed Arrangement under Chapter XI [R. 25-35], which provided, among others: that the debtor, Juvenile Products of Pasadena, be continued in possession and authorized to manage, operate and conduct the business of debtor and employ, discharge and fix the compensation of its employees (with certain specified exceptions),

all according to law and subject to such supervision and control by the court as the court might exercise by future orders [par. 2, R. 28-29], that the court retained full jurisdiction over the debtor and its property [par. 9, R. 34, 37-38]; that the debtor was to pay pre-existing federal taxes in specified instalments, and as debtor in possession, to pay taxes during the life of the Arrangement as they became due [par. 7, R. 31-33]; and that [R. 32-33]:

> the priorities with respect thereto shall not be affected by the confirmation of Debtor's arrangement but shall remain unimpaired until the taxes shall have been fully paid or satisfied; that the United States of America is hereby granted the same remedies against the Debtor, during the life of its arrangement, and against its assets, with regard to the collection of such taxes, as it had against the Debtor theretofore; * * * that subject to its approval the Court shall retain jurisdiction over the assets herein dealt with and over any and all persons, firms, or corporations to which said assets may be transferred, and over all parties appearing herein for the purpose of carrying out and giving effect to any and all provisions of said arrangement and this order of confirmation insofar as said arrangement affects and applies to tax claims of the United States of America, or for the practical protection of the tax claims of the United States upon subsequent orders pertinent to, in amplification, extension, limitation, or in otherwise modification of this order of confirmation.

The debtor in possession carried on the business under the Arrangement Plan at a heavy loss [R. 39-40], and on December 13, 1948, an order was entered terminating the Arrangement Proceedings under Chapter XI and adjudicating the debtor a bankrupt and directing that

bankruptcy be proceeded with [R. 36. 38.] Appellee herein, Paul W. Sampsell, was appointed trustee in bankruptcy [R. 41] and directed to liquidate the estate. [R. 63.]

As the Bankruptcy Referee subsequently certified to the District Court [R. 38]:

> In its said operations [as debtor in possession under the Arrangement Proceeding] the bankrupt deducted withholding taxes from wages and salaries paid by it to its employees. In due course the Collector of Internal Revenue filed herein his claim for $1,757.82, being the amount of the said taxes which were deducted, as aforesaid.

The taxes thus deducted were in collection of income taxes at the source on wages (Int. Rev. Code, Sec. 1622), and social security taxes (Federal Insurance Contribution taxes, Int. Rev. Code, Sec. 1400). [R. 79.]

On December 16, 1949, upon petition of the trustee in bankruptcy, an order was issued requiring the Collector of Internal Revenue to show cause why his claim for $1,757.82 should not be paid ratably with the other obligations incurred by the bankrupt during its operations as debtor in possession under the Arrangement Proceeding and prior to its adjudication. [R. 38.][1]

The trustee's order to show cause was duly heard and on March 3, 1950, the Referee filed his findings of fact and order, in which, while allowing the Collector's claim

---

[1]Other matters, included in the trustee's petition, are not raised on this appeal, *i.e.*, the validity of the Collector's claim for a lien based on certain taxes, not here in issue, against the proceeds of certain real property in the hands of the trustee. [R. 38, 42.]

as a claim to participate ratably with the other claims incurred by the bankrupt during his operations as a debtor in possession prior to bankruptcy adjudication, he denied the claim any priority whatsoever over any of the other claims which arose in or out of such operations. [R. 38-39, 50-51.] The facts, which the Referee found as the basis for this order, were that the sum of $1,757.82 was due and owing as withholding tax arising out of the bankrupt corporation's operation under the Arrangement Proceeding "and while within the jurisdiction of this Court" [R. 48-49], and that [R. 49]:

> when wages were paid by this bankrupt corporation during its operation under Chapter XI, the requirements that withholding taxes be withheld and placed in a trust fund were ignored, that is to say, the net amount—*i. e.,* the gross amount of wages, less the amount of withholding tax—was at all times paid; the Court further finds that during the said operation under Chapter XI, this bankrupt corporation at no time had the funds to create or did it create a separate trust fund composed of that portion of the wages withheld for the payment of withholding taxes.

Thereafter, by petition filed with the Referee on April 17, 1950, the United States applied for review by the District Court of the Referee's order of March 3, 1950, denying the Collector's claim priority over the other claims in the operation of the Chapter XI proceeding. [R. 53-60.] Upon this application for review the Referee issued his certificate to the District Court [R. 37-41], in which he summarized the evidence as follows [R. 39-40]:

> The bankrupt carried on its Chapter XI operations at a heavy loss. During such operations it did not acquire any new property. On the contrary, the

assets it had at the commencement of the said operations were substantially reduced thereby.

The bankrupt, in its operations as debtor in possession, deducted withholding taxes from the wages and salaries of its employees but it did not at any time create a special fund for any of the amounts so deducted. Furthermore, it did not at any time during the said operations have the funds necessary to create such a special fund. In other words, the bankrupt simply deducted the taxes here in question. It did not set apart the necessary funds to pay the same and it could not have done so at any time during the said operations.

No trust fund for the payment of withholding taxes was taken over by the trustee in bankruptcy in this case.

The assets in the hands of the trustee are insufficient to pay in full the obligations incurred by the bankrupt in its Chapter XI operations.

The Referee, on May 19, 1950, filed his certificate on this petition for review with the District Court [R. 37-41], followed on June 6, 1950, by a supplemental certificate which transmitted additional papers. [R. 61-62.]

From these papers, it appears that receipts of the estate upon liquidation by the bankruptcy trustee of its real and personal property amounted to at least $46,737.77 [R. 65; Ex. "A," R. 66], and that after payment of a dividend amounting to $2,108.74 [R. 69], and a number of liquidation disbursements, the trustee reported a cash balance in the estate on October 6, 1949, of $17,742.95. [R. 70.]

By its order dated September 30, 1950, the District Court entered its order on review, confirming the Referee's order of March 3, 1950. [R. 79-80.] It is from this order of the District Court, so far as it denies priority to the Collector of Internal Revenue in the amount of $1,757.82 for federal withholding taxes over other claims arising out of bankrupt's operations as debtor in possession under court appointment in the Arrangement proceeding, that the United States takes the instant appeal to this court. [R. 81.]

Statement of Points to Be Urged.

The District Court erred [R. 82-84]:

1. In confirming the Referee in Bankruptcy's order of March 3, 1950.

2. In failing to hold that all of the assets of the debtor, Juvenile Products of Pasadena, a corporation, which the trustee in bankruptcy received were constructively impressed with the trust provided by Section 3661 of the Internal Revenue Code for withholding taxes withheld from wages paid by the debtor while operating under the jurisdiction of the District Court in a Chapter XI proceeding immediately prior to its adjudication as a bankrupt.

3. In confirming the order of the Referee in Bankruptcy of March 3, 1950, and thereby holding that the claim presented by the Collector of Internal Revenue in the

amount of $1,757.82 covering federal withholding taxes withheld by the bankrupt from the wages paid its employees while the bankrupt was operating under the provisions of Chapter XI of the Bankruptcy Act must participate ratably with other claims arising under the Chapter XI operations of the debtor preceding its adjudication as a bankrupt.

4. In confirming the Referee in Bankruptcy in the latter's failure to hold that the bankrupt during the time it operated under Chapter XI of the Bankruptcy Act had the funds with which to create the trust required by Section 3661 of the Internal Revenue Code with respect to taxes withheld from the wages of its employees.

Summary of Argument.

1. In failing to recognize the adequacy of the estate at all times to satisfy the legal and equitable interest of the United States in its assets, the Referee and the court below demonstrably erred. Clearly, assets far exceeding the amount of taxes due the United States were in court custody continuously from the date of the petition in the Arrangement Proceeding through bankruptcy and came into the hands of the bankruptcy trustee. Inferably, the finding of the Bankruptcy Referee, that the debtor in possession during its operations in the Arrangement Proceeding did not have the "funds" necessary to cover the withholding taxes, must refer merely to "cash funds," but this is immaterial since the record establishes that there were at all times adequate assets in the estate to cover

the claim of the United States as equitable owner or beneficiary of a trust fund in the sum of $1,757.82.

2. The bankruptcy court, as a court of equity, must recognize and carry out any trust obligation or relationship imposed by law on assets which it is in the process of administering. The debtor in possession, as well as the bankruptcy trustee, was an officer of the court. On settled principles and on authority a court of equity controlling the estate under both officers will see to it that the succeeding bankruptcy trustee carries out such trust obligations as the preceding officer, the debtor in possession, may have failed during its incumbency to have fulfilled. The mandate of Section 3661 of the Internal Revenue Code required the court officers administering the instant estate under judicial control to hold in trust for the United States and pay to the United States the amount of taxes withheld. The instant case is to be differentiated from one where the trust obligation and relationship arose prior to bankruptcy. The estate funds here, without interruption in relationship, at all times since the filing of a petition for an Arrangement remained under the control of the bankruptcy court through its officers. No question of tracing trust property is involved, since the bankruptcy court, as a court of equity, will direct its officers in administering, as an entity, this estate in its judicial custody and under its control to comply with the equitable obligations imposed by law. Equity regards that as done which ought to be done. Hence, the court below should have directed an amount out of estate assets in its custody,

equivalent to the amount withheld from wages by the debtor in possession, to be paid over to the Government. As between administration creditors and the United States, the equities are balanced in favor of the United States. The sanction of severe penalties ordinarily is available to insure compliance with the provisions of Section 3661, but here the status of the debtor in possession under court control would be a defense. To hold the debtor in possession failed to segregate the funds is to hold the court of equity failed to do so and there is no sanction against the court. Even if the debtor in possession and its officers do not possess complete criminal immunity, surely the court will not countenance administration of funds under its control to be carried on in such a manner as to involve violation of penal laws by a court officer.

3. If this court does not agree with the contention advanced, *supra,* it is additionally argued that the amount withheld can here be shown to have augmented and be traced into the bankrupt estate. The real estate and chattels, for example, the proceeds of which the record demonstrates are in the bankruptcy trustee's possession, formed part of the estate at the time the fiduciary obligation arose under Section 3661 and have at all times remained in the estate. Despite estate losses during operations by the debtor in possession, the lowest intermediate amount was never less than the sum due the United States. Under such circumstances the burden falls upon the appellee to show dissipation of the equitable interest belonging to the United States.

ARGUMENT.

I.

The Record Establishes That at All Times After the Estate Came Under the Custody and Control of the Court, Both in the Arrangement and Bankruptcy Proceedings, the Estate Assets Were Adequate to Create a Trust to Cover the Amount of the Withholding Taxes Deducted From Wages Paid to Its Employees.

The Referee found that in its operations under the Chapter XI proceeding, the bankrupt deducted withholding taxes from wages and salaries paid by it to its employees [R. 38] that is, the gross amount of wages, less the amount of withholding tax, was at all times paid. [R. 49.] The Referee further found that the debtor corporation at no time had the "funds" to create a separate trust fund composed of that portion of the wages withheld for the payment of taxes [R. 49], and that it could not have set apart "the necessary funds" at any time during its operations as debtor in possession. [R. 40.]

On the other hand, the record establishes that the estate possessed ample assets adequate to cover and pay the withholding taxes deducted in the maximum amount of $1,757.82. [R. 38.] Thus, at the time the Chapter XI petition was filed, the debtor corporation swore to ownership of real estate valued in the sum of $61,986.12, and machinery, fixtures and tools in the sum of $15,071.59. [R. 10.] After the period of operation by the debtor in possession had concluded—during which period the disputed taxes were withheld—the trustee in bankruptcy reported to the Referee that the bankrupt estate possessed personal property appraised in the amount of $4,650 [R. 63], and real property sold to the City of Pasadena for

$36,000. [R. 64.] Indeed, the total receipts of the estate upon liquidation of its real and personal property, as reported by the bankruptcy trustee to the court, amount to at least $46,737.77. [R. 65; Ex. "A," R. 66.] Moreover, on June 15, 1949, a first dividend in the amount of $2,-108.74 was paid. [R. 69.] After the payment of this dividend and a number of disbursements incident to liquidation, the record discloses a cash balance on October 6, 1949, according to the trustee's report to the court, in the amount of $17,742.95. [R. 70.]

Inferably the finding of the Referee that the debtor in possession during its operations in the Arrangement Proceeding did not have the "funds" necessary to cover the withholding taxes must refer to "cash funds." Certainly, the record discloses that despite asserted losses incurred during the operations by the debtor in possession in the Arrangement Proceeding, the trustee at their conclusion received assets exceeding in amount many times the sum of $1,757.82 deducted in those operations for withholding taxes. Again, for reasons discussed in the succeeding points, it is, as a matter of law, irrelevant, whether or not the estate possessed cash assets sufficient to cover this sum of $1,757.82. Suffice it that the assets of the estate were at all times amply adequate to cover the claim of the United States as equitable owner or beneficiary of a trust fund in that sum. Clearly, assets far exceeding that amount were received by the trustee in bankruptcy at the end of the Arrangement operations and were at all times in the custody of the court under Chapter XI Proceedings or in bankruptcy. In failing to recognize the adequacy of the estate at all times to satisfy the legal and equitable interest of the United States in its assets, the Referee and the court below demonstrably erred.

II.

A Bankruptcy Court, as a Court of Equity, Will Require the Administration of an Estate Under Its Control to Proceed in Accordance With the Congressional Mandate and Direct, in Trust for the United States, the Segregation of Estate Assets Sufficient to Pay the Withholding Taxes Deducted and the Distribution to the United States, as Trust Beneficiary, of the Amount of the Trust Fund so Segregated.

When a court of equity proceeds with the operation or liquidation of an estate, to do equity, it must recognize and carry out any trust obligation or relationship imposed or required to be imposed by statute or otherwise on the assets, which it is in the process of administering. Here, as discussed below, the debtor in possession under the Arrangement Proceeding continued operation of the business, as an officer of the bankruptcy court. When the debtor in possession was displaced by the bankruptcy trustee, there was no break in the continuity of relationship for the order of adjudication related back and the date of the original petition for an Arrangement remained the vital date. Both continued under the control of the court, which in the last analysis administers the bankrupt estate, whether under Chapter XI or in bankruptcy, and the statutory duty, imposed upon the debtor in possession, to create a trust and pay over the trust funds to the United States, is equally imposed on the trustee in bankruptcy, who stands in the shoes of the debtor in possession. A

court of equity controlling the estate *under both officers* will see to it that the succeeding bankruptcy trustee will carry out such trust obligations as the preceding officer, the debtor in possession, may have failed during its incumbency to have fulfilled.

So the Court of Appeals for the Second Circuit in a case substantially on all fours with the instant case has ruled. In *City of New York v. Rassner,* 127 F. 2d 703, involving a New York City sales tax, the local statute made a vendor a "trustee," when collecting the sales tax from vendees. There, as here, a debtor in possession under an Arrangement under Chapter XI of the Bankruptcy Act conducted the business until it was adjudicated a bankrupt. During its operation in the Arrangement Proceeding, the debtor in possession, as here, failed to segregate the taxes. The city asserted that, by virtue of its status as a trust beneficiary, its claim for taxes collected during the administration of the business by a court officer under court control was for direct restitution from any funds of the estate and thus came ahead even of expenses of the administration. On the other hand, the bankruptcy trustee maintained that the city's claim was only on a parity with the claims of administration creditors generally to a fund insufficient to satisfy all such claims. Reversing the Bankruptcy Referee and the District Court, Judge Clark, writing for a unanimous court, sustained the city's claim for full payment ahead of claims of administration creditors, holding that it is the duty of a bankruptcy court in distributing an estate to do so equitably, and protection of a beneficiary of a trust whose funds have been misappropriated is a proper part of equitable administration.

A. The Mandate of Section 3661 of the Internal Revenue Code Required the Court Officers Administering the Instant Estate Under the Control of the Bankruptcy Court to Hold in Trust for the United States and Pay to the United States the Amount of Taxes Withheld.

Section 3661 of the Internal Revenue Code (Appendix, *infra*), reads as follows:

> SEC. 3661. ENFORCEMENT OF LIABILITY FOR TAXES COLLECTED.
>
> Whenever any person is required to collect or withhold any internal-revenue tax from any other person and to pay such tax over to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose.

Its legislative history is illuminating. The provision, expressed in identical language, originated in Section 607 of the Revenue Act of 1934, c. 277, 48 Stat. 680. The Senate Committee Report in connection with the 1934 Act, recommending enactment of this language (there denoted as Section 606) read as follows (S. Rep. No. 558, 73d Cong., 2d Sess., p. 53 (1939-1 Cum. Bull. (Part 2), 586, 626)):

> Existing law provides with respect to a number of taxes that the amount of the tax shall be collected or withheld from the person primarily liable by another person, who is required to return and pay to the Government the amount of the taxes so collected or withheld by him. This is true, for example, in the

> case of the taxes on admissions, checks, and telephone and telegraph services. Under existing law the liability of the person collecting and withholding the taxes to pay over the amount is merely a debt, and he can not be treated as a trustee or proceeded against by distraint. Section 606 of the bill as reported *impresses the amount of taxes withheld* or collected *with a trust* and makes applicable for the enforcement of the Government's claim the administrative provisions for assessment and collection of taxes. (Italics supplied.)

The Conference Report confirmed this purpose, as follows (H. Conference Rep. No. 1385, 73d Cong., 2d Sess., p. 32 (1939-1 Cum. Bull. (Part 2) 627, 639-640)):

> *This amendment impresses taxes* collected or *withheld with a trust in favor of the United States* and makes applicable for the enforcement of the Government's claim the administrative provisions applying to the assessment, collection, and payment of taxes. There is no comparable provision in the House bill. The house recedes with an amendment changing the section number. (Italics supplied.)

Accordingly, it seems clear that Congress intended to impress taxes withheld immediately with a trust in favor of the United States. Thus, instantly such an equitable obligation arose immediately the debtor in possession deducted these taxes, as indisputably the debtor deducted them here.

The Treasury Regulations confirm the trust character of the tax withheld. Thus, Regulations 116, relating to

the collection of income tax at source on wages, Section 405.301, so far as pertinent reads (Appendix, *infra*):

> The amount of any tax withheld and collected by the employer is a special fund in trust for the United States.

The same is true under Regulations 106 (Appendix, *infra*) relating to employees' tax and the employers' tax under the Federal Insurance Contributions Act. Its Section 402.304, so far as relevant, reads:

> Any employees' tax collected by or on behalf of an employer is a special fund in trust for the United States. * * *

Indeed, the withholding of the amount of these taxes from the employees' salary effects an immediate change of position so far as the Treasury is concerned. Thus (Treasury Regulations 116, *supra,* Section 405.401):

> If the tax has actually been withheld at the source, credit or refund shall be made to the recipient of the income *even though such tax has not been paid over to the Government by the employer.* * * * (Italics supplied.)

See to the same effect, Internal Revenue Code, Section 35, as amended by Section 3, Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, and Treasury Regulations 106, *supra,* Section 402.304; and the holding of the Municipal Court of Appeals for the District of Columbia in *Grasso v. Oehmann,* 75 Wash. Law Rep. 827, 54 A. 2d 570.

For an informative description of the statutory pattern, under which the employment taxes under Sections 1400

and 1401 (Appendix, *infra*), and the withholding taxes under Section 1622(a) (Appendix, *infra*), of the Internal Revenue Code are imposed, see *United States v. Fogarty,* 164 F. 2d 26, 28-29, 32-33 (C. A. 8th).

B. The Estate Funds Have Without Interruption at All Times Since the Filing of the Petition for an Arrangement Remained Under the Control of the Bankruptcy Court Through Its Officers.

The instant case is to be differentiated from one where the trust obligation and relationship arose prior to bankruptcy. Here, as the *Rassner* case (pp. 705-706) points out, the equitable obligation and interest arose after the estate came under court control and as an incident to the operation of the estate by a court of equity.

Arrangement proceedings are derived from Chapter XI of the Bankruptcy Act, as added by the Act of June 22, 1938, c. 575, 52 Stat. 840, Sections 301-399 (11 U. S. C. 1946 ed., Sections 701-799). Upon the filing of an Arrangement petition and submission of a plan by the debtor the court has "exclusive jurisdiction of the debtor and his property, wherever located." Section 311. Among its powers over the debtor and his creditors are (Section 313) the right to authorize the debtor to reject or make various types of contracts; (Section 314) to stay suits against the debtor; (Section 332) to appoint a receiver or trustee; (Section 336) to hold meetings of creditors, adjudicate claims, examine the debtor, settle the arrangement plan and in general, exercise the same powers as if (Section 341)—

> a decree of adjudication had been entered at the time the petition under this chapter was filed.

Where, as instantly, no receiver or trustee is appointed (Section 342, Appendix, *infra*)—

> the debtor shall continue in possession of his property [*sic*] and *shall have all the title and exercise all the power of a trustee appointed under this Act, subject,* however, *at all times to the control of the court* and to such limitations, restrictions, terms, and conditions as the court may from time to time prescribe. (Italics supplied.)

Under Section 343 (Appendix, *infra*)—

> the debtor in possession, shall have the power, *upon authorization by and subject to the control of the court,* to operate the business and manage the property of the debtor during such period, limited or indefinite, as the court may from time to time fix, and during such operation or management shall file reports thereof with the court at such intervals as the court may designate. (Italics supplied.)

The court shall retain jurisdiction, if so provided in the Arrangement (Section 368), and shall in any event retain jurisdiction until the final allowance or disallowance of all debts affected by the Arrangement (Section 369). In the instant case, as appears from the Statement, *supra,* the court below expressly retained full jurisdiction of the Arrangement. [R. 28-29, 32-33, 34, 38.]

Moreover, where (as here) the court has retained jurisdiction after confirmation of an Arrangement and the debtor defaults, the court is authorized where the petition has been filed (as here) under Section 322 of the Act, to enter an order adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with. [Bankruptcy Act, Section 377(2), R. 36.] Upon entry of an order

directing that bankruptcy be proceeded with in the case of a petition for an Arrangement originally filed (as here) under Section 322 of the Act, the proceeding is to be conducted, so far as possible, in the same manner and with like effect as if a voluntary petition for adjudication for bankruptcy had been filed and (Section 378(2))—

> a decree of adjudication had been entered *on the day when the petition under this chapter was filed;* * * * (Italics supplied.)

Further, in this connection, Section 302 of the Bankruptcy Act provides:

> The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent with or in conflict with the provisions of this chapter, apply in proceedings under this chapter. For the purposes of such application, provisions relating to "bankrupts" shall be deemed to relate also to "debtors," and "bankruptcy proceedings" or "proceedings in bankruptcy" shall be deemed to include proceedings under this chapter. For the purposes of such application the date of the filing of the petition in bankruptcy shall be taken to be the date of the filing of an original petition under section 322 of this Act, and the date of adjudication shall be taken to be the date of the filing of the petition under section 321 or 322 of this Act except where an adjudication had previously been entered.

The pertinency of these statutory provisions to the instant record finds apt expression in the opinion of the Court of Appeals for the Second Circuit in the *Rassner* case, where they were equally applicable, as follows (pp. 705-706):

> When the petition was filed and the debtor continued operation, it acted as an officer of the bank-

ruptcy court. Bankruptcy Act, §§342, 343, 11 U. S. C. A. §§742, 743. It was subject "at all times to the control of the court." §342. And in operating the business it had to have "authorization by and subject to the control of the court." *When the debtor was displaced by the bankruptcy trustee, there was no break in the continuity in relationship, for the order of adjudication related back and the original petition for an arrangement became the vital date.* Bankruptcy Act, §302, 11 U. S. C. A., §702; cf. *Lockhart v. Garden City Bank & Trust Co.,* 2 Cir., 116 F. 2d 658, 660. The trustee in bankruptcy, so far as outsiders are concerned, must proceed subject to any claims available against the debtor in possession. (Italics supplied.)

C. No Question of Tracing Trust Property Is Involved, Since the Bankruptcy Court, as a Court of Equity, Will Direct Its Officers in Administering This Estate, in Its Judicial Custody and Under Its Control, to Comply With Equitable Obligations Imposed by Law.

The cases cited by the District Court [R. 80], namely, *In re Independent Automobile Forwarding Corp.,* 118 F. 2d 537, 539 (C. A. 2d), reversed on other grounds, *sub nom., United States v. New York,* 315 U. S. 510; and *In re Frank,* 25 Fed. Supp. 1005 (S. D. N. Y.),[2] involve tracing trust property before bankruptcy, and, as the *Rassner* case holds (pp. 705-706), have no application where

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[2]Significantly, these cases cited by the court below were also cited by the District Court for the Eastern District of New York, whose decision the Court of Appeals for the Second Circuit reversed in the *Rassner* case. *In re New Bedford Rest.* 40 Fed. Supp. 288, 290. Again, the Court of Appeals for the Second Circuit, in the *Rassner* case, obviously considered them inapplicable, although one of the cited cases was its own prior decision and the other was a decision of a District Court in the Second Circuit.

the trust obligation is imposed *during court custody* subsequent to bankruptcy. Courts of bankruptcy are courts of equity and in the administration of bankrupt estates exercise their powers as courts of equity. *Pepper v. Litton,* 308 U. S. 295, 303-304. As discussed, *supra,* in subpoint B, there has been no break in the continuity of relationship of the equity court to this estate from the date of the filing of the petition for Arrangement through bankruptcy adjudication up to the present time. As the court officer, the debtor in possession, neglected to fulfill the obligation in equity, imposed by statute, the bankruptcy court as a court of equity will do equity and in administering the estate will see to it that its succeeding officer, the bankruptcy trustee complies with the obligation imposed by Congress. Where in violation of Section 3661 of the Internal Revenue Code these officers fail to segregate the amount of taxes withheld, the equity court will direct the performance of this equitable obligation and the distribution of the trust fund to the beneficiary, the United States. Such is the precise reasoning and the holding of the *Rassner* case with respect to a similar statutory trust recognized there in favor of the City of New York, as follows (p. 706):

> If a debtor in possession failed to segregate the taxes collected from vendees, it did so under the control of the court. * * * If we hold that the city must now trace the funds, we state in effect that any beneficiary of a trust which is handled by an officer of a bankruptcy court must always protect himself by petitioning in advance for proper administration of the trust. Thus stated, it can be seen that we would be condoning improper action by a trustee so long as he could successfully get away with it. As a court of equity, a bankruptcy court can hardly pro-

> ceed on this assumption. It is the duty of the bankruptcy court in distributing an estate to do so equitably.

Surely, as the *Rassner* opinion further declared (p. 706):

> Protection of a beneficiary of a trust whose funds have been misappropriated is a proper part of equitable administration.

In application of this principle, where trust funds are diverted by an officer of the court for use in the administration of the estate in court custody, preferential payment is accorded the trust claimant even in cases where he is unable to trace to the point of distribution.

In *Ex parte Simmonds,* 16 Q. B. D. 308 (Ct. of Appeal), the trustee in bankruptcy applied funds, received under a mistake of law, to the payment of dividends to creditors. The court later ordered the funds repaid to the person from whom they were received, out of monies later coming into the bands of the trustee. In so doing, the court, by Cotton, L. J., said (p. 314):

> But, in my opinion, we must regard the funds available for distribution among the creditors under a bankruptcy or liquidation as one entire fund, and, if that fund has been erroneously increased, * * * out of any moneys which may hereafter be in the hands of the trustee and applicable to the payment of dividends to the creditors, the amount which has come into his hand by mistake ought to be repaid.

In *Standard Oil Co. v. Hawkins,* 74 Fed. 395 (C. A. 7th), a receiver appointed by the court paid out trust funds in the administration of the receivership. In giving the trust claimant a preference, notwithstanding his

inability to trace, the court uttered language which sharply points to the distinction between the case involving misappropriation by an individual and the case, like the instant one, of misappropriation by a court officer. The court there said (p. 402):

> Here the receiver is an officer of the law, having the assets in *custodia legis*. He has no interest in the fund, save to see that it shall be distributed among those entitled to it according to the highest principles of honesty and of equity. The assets of the bank received by him are, with respect to the question in hand, to be treated as an entirety. Those assets have been swelled by the property of the appellant wrongfully obtained by the bank, and which went into the possession of the receivers. That in the payment of dividends he has disbursed the actual money so received can make no difference, so long as assets remain out of which restitution can be made. The creditors have received that to which they were not entitled, and that which belonged to the appellant. If restitution be made out of the assets still remaining, the creditors will receive no less than that to which they were originally entitled, and the appellant will only receive that which was its due. To compass such a result is the highest equity, since otherwise the appellant will be deprived of its own, and the general creditors will receive that to which they have no right.

More recently, in *Hood v. Hardesty,* 94 F. 2d 26 (C. A. 4th), certiorari denied, 303 U. S. 661, the court permitted a trust claimant to recover in full the amount of untraceable trust monies, misapplied by the receiver of a state bank in the administration of the latter's receiver-

ship. The language of the court in that case strongly supports the point urged here, as follows (p. 29):

> On the third question, no case is presented for application of the doctrine of tracing trust funds. Defendant in his official capacity has received, from the proceeds of the bonds improperly pledged, funds to which he is not legally entitled. These may have been disbursed to general creditors; but he now has on hand other funds from which restitution can be made without injustice to any one. It is well settled that in such case a court of equity will direct restitution.

See also to the same effect *In re Kenney & Greenwood,* 23 F. 2d 681 (Me.); *Shipe v. Consumers' Service Co.,* 28 F. 2d 53 (Ind.).

In the *Rassner* case, at the time the bankruptcy trustee was appointed as court officer in charge of the estate succeeding to the debtor in possession, he received only $7.50 in cash and subsequently the greater part of the money realized was made possible only because of the trustee's activities in invalidating certain mortgages covering chattels. (P. 705.) Here, as shown in Point I, *supra,* the estate has at all times been in possession of assets amply sufficient to satisfy the Government's trust claim (even though not in cash) from which the tax may be realized and paid. Moreover, even though the amount of the tax was not segregated as required by Section 3661, the assets of the estate have been augmented by the sums which would otherwise have been paid to the wage-earners and which were withheld from their salaries. Thus, plainly no sound distinction can be taken between the instant case and the *Rassner* case on the

ground that taxes were "collected" in the *Rassner* case, while they are "withheld" here. Section 3661 of the Code impresses a trust equally upon taxes "withheld" with those "collected" and there were ample assets in the instant estate to satisfy the withholding. Again, the *Rassner* case proceeds on the hypothesis that the "collected" taxes there were never segregated and they could not be traced into the bankruptcy trustee's possession.

Equity regards that as done which ought to be done. Hence, the court below should have directed an amount out of the assets in its custody, equivalent to the amount withheld from wages by the debtor in possession, to be paid over to the Government. As between administration creditors and the United States, it is submitted the equities are balanced in favor of the United States. If this Court sustains the United States, these creditors will not receive less than they would have, if the court officer in the Arrangement had complied with the statute and carried out the trust imposed. Under the decision below the creditors would be allowed to profit from a flaunting of the statute in the course of judicial administration of an estate in court custody. Again, as a consequence of withholding of tax amounts from wages, the United States has suffered a change of position since the taxes against the wage-earners by virtue of the withholding are conclusively regarded as paid. See subpoint A, *supra*.

Moreover, the sanction of severe criminal penalties ordinarily is available to insure compliance with the provisions of Section 3661. See Section 2707 of the Internal Revenue Code, made applicable to the instant taxes by Sections 1430 and 1627, the last paragraphs of Section 402.304, Treasury Regulations 106 (Appendix, *infra*), and Section 405.301 of Treasury Regulations 116 (Ap-

pendix, *infra*). Yet, as held with respect to analogous criminal penalties in the *Rassner* case (p. 706):

> The city could hardly seek fine or imprisonment of the debtor or its officers for failure to segregate funds —assuming the penal provisions, Administrative Code, c. 41, Tit. N, §41-17.0, as amended by Local Laws 1940, p. 362, go that far—because the status of the debtor as under court control would be a defense. The most that the city could seek would be a court order directing the debtor in possession to keep sales tax receipts separate from the ordinary transactions of the business, in other words, to obey the sales tax law. If we hold that the city must now trace the funds, we state in effect that any beneficiary of a trust which is handled by an officer of a bankruptcy court must always protect himself by petitioning in advance for proper administration of the trust. Thus stated, it can be seen that we would be condoning improper action by a trustee so long as he could successfully get away with it.

To hold the debtor in possession failed to segregate the taxes is to say the equity court failed to do so and there is no sanction against the court.

Even if the debtor in possession and its officers do not possess complete criminal immunity, surely the court of equity will not countenance administration of a fund under its control to be carried on in such a manner as to involve violation of penal laws by court officers.[3]

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[3]The officer of the court during the Arrangement was, of course, the debtor in possession. While the United States may have claims under the bond given by H. B. Kelley, who was appointed disbursing officer on behalf of the debtor in possession, such possible rights of action against the surety and others constitute additional remedies [R. 22-23, 29-30, 76-78], and do not derogate in any way from the contentions made here based on violations by the court officer itself, namely, the debtor corporation.

III.

In Any Event, the Trust Fund Can Here Be Traced into the Bankrupt Estate.

As set forth in the preceding Point II, in view of the uninterrupted administration and control by the equity court and its officers of the instant estate during the time when the taxes were withheld and the trust impressed under Section 3661 of the Internal Revenue Code, the tracing of a trust *res* in the premises is unnecessary. However, if this Court does not agree with the contention advanced in Point II, *supra,* or with the *Rassner* case, it is additionally argued in this Point III that the amount withheld can be shown to have augmented and can be followed into the bankrupt estate. As appears from the legislative history of Section 3661 discussed in Point II, subpoint A, *supra,* the congressional purpose was immediately to impress the amount of taxes withheld with the trust in favor of the United States, and to transform the debt obligation existing under the prior law into a trust obligation. Thus, the instant equitable interest imposed by law is markedly in contrast with the creditor-debtor relation present in *McKee v. Paradise,* 299 U. S. 119, 122-123. There, by agreement merely a debt obligation arose; here, on the other hand, Congress intentionally imposed a trust obligation and the instant record presents circumstances (*McKee v. Paradise, supra,* p. 122), "in which equity will fasten a constructive trust upon property in order to frustrate a violation of fiduciary duty."

The amount withheld never became part of the bankrupt estate. Like the sale tax involved in *In re Goldberger, Inc.,* 32 Fed. Supp. 615, 616 (E. D. N. Y.):

> It should have been set aside and kept separate for the account of the City of New York. At no time did

> this sum become a part of the estate of the bankrupt for general distribution. This amount must be paid to the City of New York before the payment of the expenses of administration, not because of priority, but due to the fact that the debtor was only the trustee of the money collected, its never becoming a part of the estate.

As discussed in Point I, *supra,* at the time the taxes were withheld, there were adequate assets in the estate (even if not in cash) to cover the trust fund. The real estate and chattels, for example, the proceeds of which the record demonstrates are in the trustee's possession, formed part of the estate at the time the fiduciary duty arose and the trust imposed and have at all times remained in the estate. As the Supreme Court of California recently held in *Garrison v. Edward Brown & Sons,* 25 Cal. 2d 473, 480, citing numerous cases:

> It is settled as to both express trusts and trusts created by operation of law that an ascertainable interest in a bank account of the trustee in which funds of the trustee and of the beneficiary are deposited constitutes an asset definite enough to be the subject matter of a trust.

The same rule, which the cited case applies to an ascertainable interest in the bank account of the trustee, should apply equally to an ascertainable interest in other estate assets. The assets, which are in the hands of the court, have been directly added to and benefited by an amount of money withheld by the debtor in possession from the wages of employees. Despite estate losses during operation by the debtor in possession, the lowest intermediate amount clearly never was less than the sum due the United States. Under such circumstances the burden or

"laboring oar" falls upon the appellee to show dissipation of the equitable interest belonging to the United States. As this Court held in *Scully v. Pacific States Savings & Loan Co.*, 88 F. 2d 384, 387, certiorari denied, 301 U. S. 704:

> The cash items being shown to be in the trust fund, the lien must be impressed, unless appellant, who has the laboring oar, has shown a dissipation of the trust fund.

And see numerous authorities listed in note 2 of the cited case.

Conclusion.

For the reasons above given, the order of the District Court is erroneous and should be reversed.

Respectfully submitted,

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APPENDIX.

Bankruptcy Act, c. 541, 30 Stat. 544:

SEC. 342 [as added by the Act of June 22, 1938, c. 575, 52 Stat. 840, 909]. Where no receiver or trustee is appointed, the debtor shall continue in possession of his propetry [*sic*] and shall have all the title and exercise all the powers of a trustee appointed under this Act, subject, however, at all times to the control of the court and to such limitations, restrictions, terms, and conditions as the court may from time to time prescribe.

(11 U. S. C. 1946 ed., Sec. 742.)

SEC. 343 [as added by the Act of June 22, 1938, *supra*]. The receiver or trustee, or the debtor in possession, shall have the power, upon authorization by and subject to the control of the court, to operate the business and manage the property of the debtor during such period, limited or indefinite, as the court may from time to time fix, and during such operation or management shall file reports thereof with the court at such intervals as the court may designate.

(11 U. S. C. 1946 ed., Sec. 743.)

Internal Revenue Code:

SEC. 1401. DEDUCTION OF TAX FROM WAGES.

(a) *Requirement.*—The tax imposed by section 1400 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid.

* * * * * * * *

(26 U. S. C. 1946 ed., Sec. 1401.)

SEC. 1622. [As added by the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, Sec. 2.] INCOME TAX COLLECTED AT SOURCE.

(a) [as amended by Revenue Act of 1948, c. 168, 62 Stat. 110, Sec. 501] *Requirement of Withholding.*—Every employer making payment of wages shall deduct and withhold upon such wages a tax equal to 15 per centum of the amount by which the wages exceed the number of withholding exemptions claimed multiplied by the amount of one such exemption as shown in subsection (b) (1).

* * * * * * * *

(26 U. S. C. 1946 ed., Sec. 1622.)

SEC. 3661. ENFORCEMENT OF LIABILITY FOR TAXES COLLECTED.

Whenever any person is required to collect or withhold any internal-revenue tax from any other person and to pay such tax over to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such funds shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose.

(26 U. S. C. 1946 ed., Sec. 3661.)

Treasury Regulations 106, promulgated under the Internal Revenue Code:

SEC. 402.304. *Collection of, and liability for, employees' tax.*—The employer shall collect from each of his employees the employees' tax with respect to wages for employment performed for the employer by the employee. The employer shall make the collection by deducting or causing to be deducted the amount of the employees' tax from such wages as and when paid, either actually or constructively. The employer is required to collect the tax, notwithstanding the wages are paid in something other than money (for example, wages paid in stock, board, lodging; see section 402.227) and to pay the tax to the collector in money. In collecting employees' tax, the employer shall disregard any fractional part of a cent of such tax unless it amounts to one-half cent or more, in which case it shall be increased to 1 cent. The employer is liable for the employees' tax with respect to all wages paid by him to each of his employees whether or not it is collected from the employee. If, for example, the employer deducts less than the correct amount of tax, or if he fails to deduct any part of the tax, he is nevertheless liable for the correct amount of the tax. Until collected from him the employee is also liable for the employees' tax with respect to all the wages received by him. Any employees' tax collected by or on behalf of an employer is a special fund in trust for the United States. The employer is indemnified against the claims and demands of any person for the amount of any payment of such tax made by the employer to the collector.

Section 2707 of the Internal Revenue Code (see page 87 of these regulations) provides severe penalties for a willful failure to pay, collect, or truthfully account for and pay over, the employees' tax or for a willful attempt in any manner to evade or defeat the tax. Such penalties may be incurred by any person, including the employer, and any officer or employee of a corporate employer, or member or employee of any other employer, who as such employer, officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

Treasury Regulations 116, promulgated under the Internal Revenue Code:

SEC. 405.301. *Liability for Tax.*—The employer is required to collect the tax by deducting and withholding the amount thereof from the employee's wages as and when paid, either actually or constructively. As to when wages are constructively paid, see section 405.1. An employer is required to deduct and withhold the tax notwithstanding the wages are paid in something other than money (for example, wages paid in stocks or bonds; see section 405.101) and to pay the tax to the collector or duly designated depository of the United States, as the case may be, in money. If wages are paid in property other than money, the employer should make necessary arrangements to insure that the amount of the tax required to be withheld is available for payment to the collector.

Every person required to deduct and withhold the tax under section 1622 from the wages of an employee is liable for the payment of such tax whether or not it is collected from the employee. If, for example, the employer deducts less than the correct amount of tax, or if he fails to deduct any part of the tax, he is nevertheless liable for the correct amount of the tax. However, if the employer in violation of the provisions of section 1622 fails to deduct and withhold the tax, and thereafter the income tax against which the tax under section 1622 may be credited is paid, the tax under section 1622 shall not be collected from the employer. Such payment does not, however, operate to relieve the employer from liability for penalties or additions to the tax for failure to deduct and withhold within the time prescribed by law or regulations made in pursuance of law. The employer will not be relieved of his liability for payment of the tax required to be withheld unless he can show that the tax against which the tax under section 1622 may be credited has been paid.

The amount of any tax withheld and collected by the employer is a special fund in trust for the United States.

The employer or other person required to deduct and withhold the tax under section 1622 is relieved of liability to any other person for the amount of any such tax withheld and paid to the collector or

deposited with a duly designated depositary of the United States.

Section 2707 provides severe penalties for a willful failure to pay, collect, or truthfully account for and pay over, the tax imposed by section 1622, or for a willful attempt in any manner to evade or defeat the tax. Such penalties may be incurred by any person, including the employer, and any officer or employee of a corporate employer, or member or employee of any other employer, who as such employer, officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

No. 12,811.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate of Juvenile Products of Pasadena, a corporation, Bankrupt,

Appellee.

BRIEF FOR THE APPELLEE.

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Appellee.

BRIEF FOR THE APPELLEE.

Statement of Facts.

Appellee has examined the Statement of Facts contained in Appellant's Opening Brief, and finds that it is accurate as far as it goes. However, desiring to assist the Court in obtaining the proper perspective in this matter, Appellee wishes to outline in slightly more detail the course of proceedings which culminate in the appeal now under argument.

These proceedings were initiated by the filing of a Petition under Chapter XI, Sec. 322 of the Bankruptcy Act. On July 24, 1948 a Plan of Arrangement was confirmed by the Referee [R. 25-35]. Essentially, this Plan was to pay past creditors out of the proceeds of future opera-

tion [R. 33-34]. Jurisdiction was retained in the Bankruptcy Court for the period required for the fulfillment of the Plan of Arrangement [Par. 9, R. 34, 37-38]. Owing to business vicissitudes, the debtor was unable to operate at a profit; it was, however, able to keep open its doors for some months despite its deteriorating financial situation. It was during this time that the large obligations for taxes, labor and merchandise were incurred, which the Referee has found should share *pro rata* in a fund insufficient to pay all in full [R. 50-51]. In the end, the Referee terminated the losing struggles of the debtor and adjudicated it a bankrupt on December 13, 1948.

Immediately upon adjudication Paul W. Sampsell was appointed Trustee [R. 63] by Order of Court and directed to liquidate the assets of the bankrupt estate. The Trustee, Paul W. Sampsell, received, as reflected by his First Report and Account, the following assets: merchandise and equipment inventoried at $18,058.50 and appraised at $4,650.00 [R. 63]; real property appraised at $36,000.00 and sold for $33,000.00 to the City of Pasadena [R. 64]; and cash totaling $1,105.90 [R. 66]. (Be it noted, that the record indicates [R. 66] that this total of $1,105.90 was composed of $974.67 as "balance from fire losses" and $131.23 as "receipts from sales.") The record does not disclose the receipt of any funds earmarked for taxes of any kind.

After all the assets of the bankrupt estate had been liquidated by the Trustee, the total on hand was insufficient to pay in full all claims arising out of the opera-

tions of the debtor after confirmation of the Plan of Arrangement and before adjudication. Having been informed that Appellant insisted on payment in full of its Chapter XI claim ahead of all other Chapter XI claims, the Appellee filed with the Referee his Petition for Order to Show Cause and for an Order to Restore Order to Show Cause to Calendar [R. 41-44] on which an Order to Show Cause was duly made demanding the presence of the Appellant to try out his asserted claim [R. 44-45].

Before the Referee, and before the District Judge Appellant asserted its right to payment in full before other Chapter XI creditors on two theories: a right to priority of payment under the provisions of the Bankruptcy Act; and a right by a virtue of a trust or equitable lien impressed on all the assets of the bankrupt estate. The first of these two contentions was rejected by both the Referee and the District Judge on the strength of the rule laid down in *Vogel v. Mohawk Electric Sales Co.,* 126 F. 2d 759 (C A. 2d). (It is significant that this contention is not at all urged in Appellant's brief here.) Likewise, both the Referee and the District Judge have rejected the lien or trust claimed by the Appellant; it is to this latter point that Appellant's Opening Brief is entirely directed, and to which Appellee's Brief in answer shall be oriented.

A final fact in this record should be recognized. At the direction of the Court, the Trustee has liquidated all assets of this bankrupt estate in the manner set out in the Trustee's First Report and Account [R. 63-64]. In the process of this liquidation the Trustee expended consider-

able sums [R. 66-70], and became responsible for court costs, costs of and fees to Trustee and his counsel. These have been paid out of the proceeds of this estate. In the light of *Vogel v. Mohawk Electric Sales Co.,* the Appellee cannot see any possible objection to the payment of such expenses before payments to any Chapter XI creditors. It is true that in the instant appeal there are sufficient funds in the hands of the Trustee to pay all such expenses of administration as well as Appellant's claim in full. However, if the contention of Appellant is upheld and carried to its logical conclusion, the result would be to turn all the assets over to Appellant until the trust asserted was satisfied, leaving the Bankruptcy Court powerless to liquidate the assets and pay the costs incident thereto. Appellee does not understand Appellant to be asserting a right to the payment of Chapter XI tax claims before the general expenses of liquidation and administration of the Bankrupt's estate; and it is on this understanding and basis that Appellee submits his brief.

Questions Involved.

I. Can a trust fund in favor of the Appellant herein under section 3661 of the Internal Revenue Code be traced into the fund presently in the hands of the Appellee?

II. Can all funds presently in the hands of the Appellee, without regard to their source, be impressed with a trust or equitable lien in favor of the Appellant herein?

ARGUMENT.

I.

No Trust Fund Belonging to the Appellant Can Be Traced into the Fund Presently in the Hands of the Appellee.

As a point of departure, Appellee takes the law as established that where trust funds have been misapplied, commingled or otherwise improperly dealt with, the *cestui,* to enforce his rights to the proceeds of the trust, must be able to follow the trust property into its new guise, see *Restatement of Trusts,* Section 202; *Restatement of Restitution,* Section 202 *et seq.*; *People v. California Safe Deposit etc. Company,* 175 Cal. 756; *In re Frank,* 25 Fed. Supp. 1005 (D. C., S. D. N. Y.). The rule is succinctly stated in Corpus Juris, Trusts, Section 889.

> "The right to follow trust property, in equity being based on the theory that a right of property still exists in the *cestui que trust,* the equitable right of recovery or reclamation generally does not exist or no trust or lien can be enforced, if the trust property cannot be identified, or traced into some specific fund or thing, which is sought to be charged, and into which the original trust property has gone in some form or other."

Before a *cestui* may begin to trace his trust, he must first establish its existence, otherwise he has nothing to follow. Our first problem, thus, is to decide whether or not the Appellant has a trust, the proceeds of which it may follow.

The Appellant relies upon Section 3661 of the Internal Revenue Code for creation of its trust rights. The pertinent language of Section 3661 is as follows:

> "Whenever any person is required to collect or withhold any internal-revenue tax from another person and to pay such tax over to the United States, the amount of tax *so collected or withheld shall be held to be a special fund in trust for the United States.*" (Emphasis supplied.)

Appellee urges that even the most cursory inspection of Section 3661 indicates that before the trust provided by this statute can arise there must first be a tax "collected or withheld"—as the above emphasized language of the statute indicates.

The extensive background of Section 3661, and its interpretation, cited at length by the Appellant only serves to emphasize this important qualification of the trust rights conferred by Section 3661. The Senate Committee Report in connection with the original enactment of Section 3661 is as follows (S. Rep. No. 558, 73d Cong. 2d Sess., p. 53 (1939-1 Cum. Bull. (Part 2), 586, 626)):

> "Existing law provides with respect to a number of taxes that the amount of the tax shall be collected or withheld from the person primarily liable by another person, who is required to return and pay to the Government the amount of the taxes so collected or withheld by him. * * * Under existing law the liability of the person collecting and withholding the taxes to pay over the amount is merely a debt, and he can not be treated as a trustee or proceeded against by distraint. Section 606 of the bill as reported impresses the

amount of taxes *withheld or collected with a trust* and makes applicable for the enforcement of the Government's claim the administrative provisions for assessment and collection of taxes." (Emphasis supplied.)

The Conference Report on the same bill reflects the same qualification on the rights being conferred. (H. Conference Rep. No. 1385, 73d Cong., 2d Sess., p. 32 (1939-1 Cum. Bull. (Part 2) 627, 639-640)):

"This amendment impresses *taxes collected or withheld with a trust* in favor of the United States and makes applicable for the enforcement of the Government's claim the administrative provisions applying to the assessment, collection, and payment of taxes." (Emphasis supplied.)

Treasury Regulations recognize this qualification on the rights conferred by Section 3661. See Regulations 116, Section 405.301 as follows:

"The amount of *any tax withheld and collected* by the employer is a special fund in trust for the United States." (Emphasis supplied.)

See also Regulations 106, Section 402.304:

"Any employees' *tax collected* by or on behalf of an employer is a special fund in trust for the United States. * * *" (Emphasis supplied.)

Now, the Referee has found [R. 49]:

"* * * the court further finds that when wages were paid by this Bankrupt Corporation during its operation under Chapter XI, the requirements that withholding taxes be withheld and placed in a trust fund were ignored, that is to say, the net amount—*i. e.,* the gross amount of wages, less the amount of

withholding tax—was at all times paid; the Court further finds that during the said operation under Chapter XI this Bankrupt Corporation at no time had the funds to create or did it create a separate trust fund composed of that portion of the wages withheld for the payment of the withholding taxes."

It seems to the Appellee that this Finding, which, be it noted, is not challenged anywhere in the Appellant's Opening Brief, effectively concludes the question of any direct trust rights in the Appellant under Section 3661 of the Internal Revenue Code. In order for the trust fund created by Section 3661 to come into existence the taxes must actually be collected or withheld. It has been specifically found by the Referee in this case that no such taxes were ever collected or withheld. Here was a debtor operating under Chapter XI on the ragged edge of financial collapse. When pay-rolls fell due the net amounts necessary were wrung from the business and the net amount only was paid to employees. The debtor never had in his hands at any time the difference between the net amount of wages paid and the gross amount of wages, that is, the withheld taxes.

Assuming for the purposes of argument that the withheld taxes were actually withheld and that therefore Section 3661 of the Internal Revenue Code did actually raise a trust in favor of the Appellant, the problem of tracing the trust funds into their metamorphoses still confronts the government. This record does not disclose that any of the sums so assumed to have been withheld were ever incorporated into any of the assets which came to the hands of the Trustee in Bankruptcy. The Trustee received $1,105.90 in cash funds from H. B. Kelley, the disbursing agent [R. 66]; of this $974.67 was a "balance from fire

losses" [R. 66] and $131.23 was a "receipts from sales" [R. 66]. The mere designation of these funds precludes the conclusion that any money assumed to have been impressed by Section 3661 of the Internal Revenue Code with a trust was commingled therewith. For the rest, the record reflects that the Trustee received real estate [R. 64], merchandise, supplies, machinery and office furniture and fixtures [R. 63]. The Appellee repeats that in none of these assets has the Appellant been able to demonstrate the investment or the inclusion of so much as one penny of any taxes assumed to have been withheld.

With a deviousness which somewhat confounds the Appellee, and in the face of a record which contains no evidence to support it, Appellant contends that the assumed trust funds can here be traced into the assets in the hands of the Trustee. First of all Appellant argues that the amount withheld never became part of the bankrupt estate. There can be no question that *if* taxes were actually withheld and *if* this sum could be identified it would belong to the Government and should be turned over to it forthwith. Indeed, that is precisely the situation in the case on which the Government rests in support of its contention, namely, *In re Goldberger, Inc.,* 32 Fed. Supp. 615 (E. D. N. Y.). In this case the bankrupt, operating under Section 77b of the Bankruptcy Act before that Act was amended in 1938, collected $162.76 in city sales taxes. Apparently the sales tax had been held separate and was a fund existing in the hands of the Trustee at the time of appeal. The Trustee contested the demand of the City of New York that he pay it over, and contended that the City should be treated in the same manner as any other tax creditor. The *Goldberger* case is not apposite to this appeal. In that case the money had been withheld and apparently was in

existence as a separate fund; here, aside from the fact that the Finding of the Trial Court indicates no monies were ever withheld, these monies do not presently exist, were not turned over to the Trustee in a separate fund. Therefore the *Goldberger* case is of no assistance in determining the rights of the Appellant in the instant appeal.

Next, in support of this contention Appellant turns to the case of *Garrison v. Edward Brown & Sons,* 25 Cal. 2d 473, and cites it to the following effect:

> "It is settled both as to express trusts and trusts created by operation of law that an ascertainable interest in the bank account of the trustee in which funds of the trustee and the beneficiary are deposited constitutes an asset definite enough to be the subject matter of the trust."

Appellee concedes this is a proper statement of the law on this point. Consider, however, the use to which Appellant puts the rule enunciated. The Appellant concludes from this case as follows (p. 31):

> "The same rule, which the cited case applies to an ascertainable interest in the bank account of the trustee, should apply equally to an ascertainable interest in other estate assets. The assets, which are in the hands of the Court, *have been directly added to and benefited by an amount of money withheld by the debtor in possession from the wages of employees.*" (Emphasis supplied.)

The italicized portion of the Appellant's argument begs the question involved in this appeal because it assumes the very fact that Appellant is attempting to demonstrate—that is, that the funds assumed to be withheld were incorporated in or became a portion of the assets which were later turned over to the Trustee. There is not a bit of evidence in this record to sustain such a conclusion.

Appellant attempts to cast the burden of proof as to this essential tracing of trust property upon the Appellee by citing *Scully v. Pacific State Savings & Loan Company,* 88 F. 2d 384 (C. A. 9) to the effect that:

> *"The cash items being shown to be in the trust fund, the lien must be impressed,* unless Appellant, who has the laboring oar, has shown a dissipation of the trust fund." (Emphasis supplied.)

The italicized portion again illustrates the effort of the Appellant to beg the question here: the *Scully* case proceeds upon the obvious theory that the cash items, in that case deposits made by an agent in a general account, are shown to actually have been trust funds commingled with the general funds of the agent. The very essence of tracing the trust property in this appeal is to demonstrate that the taxes allegedly withheld were incorporated in, and were a portion of the assets which were eventually turned over to the trustee. Appellee can only restate the same point: that there is no evidence anywhere in this record indicating that the taxes withheld became a portion of or were invested in, or were included in any way in the assets which eventually came to the hands of the Trustee.

To summarize the argument so far made by the Appellee, the claim of Appellant to treatment distinct from other creditors whose claims arose after confirmation of the Plan of Arrangement, but before adjudication can not rest upon any trust created by the debtor for the following reasons: (1) No taxes were withheld and therefore the trust raised by Section 3661 of the Internal Revenue Code did not come into existence. (2) Even assuming that there was a trust raised by Section 3661 of the Internal Revenue Code, Appellant has been unable to trace any of such assumed trust funds into assets which came to the Trustee in bankruptcy upon his qualification.

II.

The General Assets of the Bankruptcy Estate Should Not Be Impressed With an Equitable Lien or Trust Unless Trust Funds Can Be Followed Into Them.

Appellant makes as its principal contention "a bankruptcy court, as a court of equity, will require the administration of an estate under its control to proceed in accordance with the congressional mandate and direct, in trust for the United States, the segregation of estate assets sufficient to pay the withholding taxes deducted and the distribution to the United States, as trust beneficiary, of the amount of the trust fund so segregated." Reduced to its simplest terms this contention seeks to impress a trust on the general assets of a bankruptcy estate without regard to whether or not trust funds can be traced thereto.

To support its principal argument Appellant relies mainly upon the case of *City of New York v. Rassner,* 127 F. 2d 703 (C. A. 2d). In this case, New Bedford Rest, Inc., filed a petition for an arrangement under Chapter XI of the Bankruptcy Act, 11 U. S. C. A., Sec. 701 *et seq.,* on January 19, 1939. The debtor was permitted to remain in possession and to operate the business until November 14, 1939, at which time it was adjudicated a bankrupt. In the interim, and during the course of the operation of its business, the debtor in possession collected New York City sales taxes. The New York law constituted the vendor a "trustee" when collecting such sales taxes from vendees. After adjudication, Rassner was appointed Trustee and received $7.50 in cash as the only assets turned over to him by the debtor. Thereafter, certain chattel mortgages were invalidated and the property so obtained liquidated so that the estate realized $4,272.95

therefrom. The City of New York claimed that it was entitled to payment in full out of the proceeds of the funds in the hands of the Trustee for all sales taxes collected by the debtor in possession. The Court of Appeals for the Second Circuit held that the City of New York was entitled to payment in full, that an equitable lien or trust would be impressed on all assets, regardless of their source, to provide such payment.

Appellants asserts that the *Rassner* case is "substantially on all fours with the instant case." With this conclusion Appellee cannot agree: a careful study of the *Rassner* case indicates to the Appellee that it can be distinguished on a number of grounds.

First of all, the opinion in the *Rassner* case indicates very clearly that the sales tax had actually been collected by the vendor-debtor in possession. At page 705 of 127 F. 2d the Court says:

> "*Since the records of the debtor disclose that the tax was collected,* the city may rest on its status as a beneficiary of a trust." (Emphasis supplied.)

And again in discussing a number of cited cases which will be examined at more length later on in Appellee's Brief, at page 706 of 127 F. 2d the Court says:

> "It is hardly an answer to these cases to say that in them the general estate has been augmented by the proceeds; for that happened no more or no less in this case unless we assume, without evidence and contrary to all presumption, that here the debtor made off with the funds."

From these statements Appellee contends that it is apparent that in deciding the *Rassner* case the Court proceeded upon an assumption that the sales tax had been collected

and that at one time there was actually a trust fund composed of the funds so collected in existence. As argued hereinbefore, and repeated here, the position of Appellee is that there has never been any trust fund in existence in this instant appeal. Section 3661 of the Internal Revenue Code provides for a trust fund of "the amount of tax so collected or withheld." The record in this case, and the Finding of the Referee, indicates very clearly that there were never any taxes withheld, and therefore under Section 3661 of the Internal Revenue Code, and by its specific language, the instant case differs from the *Rassner* case because there was never any trust fund in existence to be improperly dissipated by the debtor in possession.

The *Rassner* case depends upon a number of other cases which have the same distinction as Appellee has made hereinabove to the *Rassner* case: they are all cases in which the trust has actually at one time been in existence. In the case of *Standard Oil Company of Kentucky v. Hawkins,* 74 Fed. 395 (C. A. 7) the problem was raised by the payment of money under a mistake of law. On July 24, 1893, the Indianapolis National Bank closed its doors and never reopened them. Apparently it was hopelessly insolvent at that time. Shortly before the conclusion of business on July 24th the Standard Oil Company deposited $1746.71 in the bank. Thereafter Hawkins became Receiver of the National Bank through appointment by the Comptroller of Currency. Appellant filed a claim with the Receiver embodying the $1,746.71 paid on July 24, and received a 25% dividend thereon, which was refused. It later developed that the Standard Oil Company might be able to recover the deposit made on July 24. Among other contentions made was that the Standard Oil Company could not recover because of inability to trace its funds.

At page 399 of 74 Fed. the Court makes the following ruling on this contention:

> "In such case equity should compel restitution of that which has been diverted, and, being unable to lay hold of the specific moneys improperly received, will seek to make restitution out of the assets which remain."

It is very apparent in this case that at one time the Receiver, or the National Bank had actually in its possession the funds which belonged to the Standard Oil Company. Another case similar to this is that of *Hood v. Hardesty,* 94 F. 2d 26 (C. A. 4th). The Receiver of a national bank, the plaintiff here, in accordance with local law, deposited with the Receiver of the State Bank, defendant here, certain bonds to secure deposits made by the defendant with the plaintiff. Thereafter the plaintiff became insolvent and the pledged bonds were sold with the approval of the plaintiff and the proceeds of the sale paid over to the defendant. Now plaintiff seeks to recover the payments claiming that the funds so paid over were a trust fund. At page 29 of 94 F. 2d the Court makes this ruling concerning following trust funds:

> "On the third question, no case is presented for application of the doctrine of tracing trust funds. Defendant in his official capacity has received, from the proceeds of the bonds improperly pledged, funds to which he is not legally entitled. These may have been disbursed to general creditors; but he now has on hand other funds from which restitution can be made without injustice to any one. It is well settled that in such case a court of equity will direct restitution."

The *Rassner* case also relies upon *Shipe v. Consumers' Service Co.,* 28 F. 2d 53 (D. C. N. D. Ind.). In that case the bankruptcy estate consisted of filling stations operated by the Receiver in bankruptcy. During the operation the Receiver collected $156.13 in "license fee" at the rate of three cents per gallon on all gasoline sold. This money was collected under a statute of the State of Indiana which provided that the money should be collected and that any one so collecting the money should account to the State therefor. The District Court held that the Receiver was a dealer in gasoline, that when he collected the money he became a fiduciary holding it for the benefit of the State of Indiana. In response to the contention that the State could not recover the funds because they could not be traced, the Court at page 54 of 28 F. 2d ruled as follows:

> "* * * the fact that the identical money cannot be traced, that there are no 'ear-marks' to enable identification, is not material. The 'ear-mark' rule has long since been modified, to permit the payment out of any funds in the hands of the receiver."

In the case of *In re Kenney & Greenwood, Inc.,* 23 F. 2d 681 (D. C. Me.). The claimant had deposited with the bankrupt, prior to bankruptcy, certain securities. The trustee in bankruptcy took these securities over and sold them for $917.77. At one time during the course of the trustee's administration he paid out under Order of Court more money than he received from the sale of the bonds. The Court ruled in response to the contention that the trust funds could not be traced that restitution would not need to be made out of the particular proceeds of the bonds, but could be made out of the general assets of the estate. Finally in the case of *Ex parte Simmons,* 16 Q. B. Div. 308, a case was presented where moneys had been paid to

a bankruptcy trustee in England under a mistake of law. Thereafter the Trustee had distributed the funds to creditors. The Court held that the money which had come into the hands of the Receiver, later the Trustee in bankruptcy, must be returned as it would be an unjust enrichment to creditors to permit them to retain that to which the estate was not entitled. The Court determined that the repayment could be out of any assets in the hands of the bankruptcy trustee and need not depend upon tracing of trust funds.

In each of the cases cited at length above, assets were brought in to the estate and a trust therefor at one time created. In the instant appeal, however, no funds were brought into the estate, no trust fund was ever created under Section 3661 of the Internal Revenue Code. Thus, the reasoning on which all of the above cases, leading to the *Rassner* case, depended—unjust benefit to creditors—is not present in the instant appeal. Here, instead, it is proposed to deprive Chapter XI creditors still further because of an improper act by the debtor in possession from which they do not benefit and over which they had no control. Appellee feels that to do this in the name of equity is to lend that venerable institution to the perpetration of a gross injustice.

Another ground on which the *Rassner* case may be distinguished in the opinion of Appellee depends upon the course taken by the proceeding in that case as compared with the instant appeal. The Appellee submits that they are not the same. A careful reading of the opinion in the

Rassner case indicates that the petition in Chapter XI was filed January 19, 1939, and the court states at pages 704 and 705 of 127 F. 2d:

> "* * * the debtor was permitted to remain in possession and to conduct the business until November 14, 1939, when it was adjudicated a bankrupt."

The opinion is silent as to any confirmation of a Plan of Arrangement. In the absence of such statement Appellee believes that we are justified in assuming that between January 19, 1939, and November 14, 1939, this business was operated by a debtor in possession who was, simultaneously, attempting to perfect a Plan of Arrangement which would meet with the acceptance of his creditors. Apparently the debtor in possession was not successful in coming forth with such a plan and adjudication followed. This is not the factual situation on the instant appeal. On April 6, 1948, the Juvenile Products of Pasadena, the debtor, filed a Chapter XI Petition under Section 322 of the Bankruptcy Act. The debtor was permitted to remain in possession. On July 24, 1948, an Order was made confirming a proposed Plan of Arrangement under Chapter XI. On December 13, 1948, the debtor, having failed to live up to its Plan of Arrangement, was adjudicated a bankrupt, and the Referee entered an Order directing that bankruptcy be proceeded with in the usual manner. The controversy here has to do with taxes incurred between July 24, 1948, and December 13, 1948.

Even the most cursory reading of the opinion by the Court in the *Rassner* case indicates that behind it lies a sense of shock that a Federal Court could have been so lax as to permit its agent to misapply trust funds. The theory of the *Rassner* opinion seems to be that where

Court appointed fiduciaries have misappropriated a trust fund and misapplied the proceeds thereof, all assets of the estate should be charged, in equity, with an equitable lien or trust to protect the *cestui.* At page 706 of 127 F. 2d the Court rules as follows:

> "Protection of a beneficiary of a trust whose funds had been misappropriated is a proper part of equitable administration."

Such a theory proceeds upon the close interrelationship of the Court with its appointed agent who has misapplied trust funds. Where the debtor is in that misty period when it is attempting to perfect a Plan of Arrangement, and it is as yet undetermined as to whether the plan will be confirmed, the debtor adjudicated, or the proceedings dismissed entirely, as a practical matter the bankruptcy court must, of necessity, be very close to the day to day operations of the debtor. This is necessary so as to protect the interest of various creditors. Once, however, a plan of Arrangement is confirmed a distinct alteration in the complexion of the proceedings takes place. The debtor is, at least in theory, on his way out of the woods, although the timber may still be thick about him. The rights of his creditors have been materially altered by the confirmation of the Plan of Arrangement; and his duties to them fixed in a new mold. Thus, as a practical matter, the supervision by the bankruptcy court of a debtor operating under a confirmed Plan of Arrangements is not as close as the supervision of a Court during the period antedating the confirmation of such a plan. To grasp this essential distinction, is to perceive the essence of the clear difference Appellee sees between the *Rassner* case and this instant appeal. What basis in equity there is for attaching an equitable lien or trust on assets into which no trust

funds can be traced must rest on the participation of the court, through its agents, in an unmoral misapplication of funds not actually the property of the bankruptcy administration. When a Plan of Arrangement has been confirmed, the relation of the Court to the debtor in possession becomes tenuous indeed; the only concern of the Court then, is to see that the terms of the Plan are faithfully and fully carried out. Appellee submits that in such a situation the intimate relationship which is the theoretical basis of the *Rassner* case is gone and its harsh rule should not be applied.

Appellee is not unmindful of the fact that in the Plan of Arrangement as confirmed in this case jurisdiction over the debtor was retained by the bankruptcy court. A reading of the entire order confirming the Plan of Arrangement, with particular attention to the portion which provides for retention of jurisdiction, indicates that implicit throughout that Order is the intention of the Court that the debtor under the confirmed Plan should continue to operate its business, and that jurisdiction would be retained only so that the Court could make sure that the debtor complied with the terms of the Plan of Arrangement. Under the Order retaining jurisdiction the Court had no intention of becoming a day by day supervisor of the operations of the debtor, such as would have been necessary to assure that all taxes were being paid, that all current obligations were being met, etc. The situation was that the debtor was operating under his plan of Arrangement, attempting to make sufficient profit to pay off old creditors; the court had merely retained jurisdiction to see that those payments were made. Appellee submits that it is unfair to fasten upon all the assets of this Estate a lien as provided in the *Rassner* case simply because the

Court endeavored to see that the Plan of Arrangement which it had approved was fairly and fully carried out.

In the *Rassner* case the Court makes clear that one of the fundamental reasons behind its decision was the inability of the City of New York to secure satisfaction from the Court or any of its agents for the failure to hold separate the sales taxes collected. The Court in the *Rassner* case at page 706 of 127 F. 2d says:

> "The City could hardly seek fine or imprisonment of the debtor or its officers for failure to segregate funds—assuming the penal provisions, Administrative Code, c. 41, Tit. N, Sec. 41-17.0 as amended by Local Laws 1940, p. 362, go that far—because the status of the debtor as under court control would be a defense."

The disbursing agent H. B. Kelley, is in the instant case under bond and his bond is not exonerated under the Bankruptcy Act until July, 1951. Section 50 of the Bankruptcy Act (U. S. C., Tit. 11, Chapter 5, Sec. 78) provides as follows:

> "Proceedings upon receiver's or trustee's bonds shall not be brought subsequent to two years after their respective discharges."

If the law has been in any way violated the proper remedy for Appellant is to proceed against Kelley on his bond. Appellee submits that in view of this other possible remedy it is inequitable to attempt to fix upon all the assets of this estate an equitable lien or trust in favor of the appellant. To establish such equitable rights is to deprive other creditors of payment, and yet permit the disbursing agent who was bonded for faithful performance of his duty to escape liability.

One final point should be raised in connection with the *Rassner* decision. At page 707 of 127 F. 2d the Court states:

> "The city agrees that the trustee may receive the value of his services in creating the fund, and we think that a reasonable view."

As indicated hereinbefore, this argument by the Appellee proceeds on the assumption that the Appellant does not contest the right of the bankruptcy court to direct payment of the expenses of liquidation ahead of any payment to the Appellant, even if the trust asserted by the Appellant were to be upheld. To rule so would be to cripple bankruptcy administration by denying to it the right to pay for the conduct of the liquidation. To adopt so extreme a rule would be disastrous to cases now pending which present the same problem as this instant appeal only in a more aggrevated form.

Conclusion.

For reasons set out at length hereinbefore, Appellant should be denied payment before other creditors whose claims arose after the confirmation of the Plan of Arrangement and before adjudication; rather the Appellant should share *pro rata* with such creditors. The Order of the District Court to this effect is correct and should be sustained.

Respectfully submitted,

C. E. H. McDonnell,
Of Counsel.

No. 12812

United States
Court of Appeals
For the Ninth Circuit.

JOSEPH C. PATTERSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Appeal from the District Court
for the Territory of Alaska,
Division Number One.**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12812

United States
Court of Appeals
For the Ninth Circuit.

JOSEPH C. PATTERSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

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for the Territory of Alaska,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

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Ketchikan, Alaska.

CUDDY & KAY,
Anchorage, Alaska,
For Appellant.

P. J. GILMORE, JR.,
United States Attorney, First Division,
For Appellee.

In the District Court for the Territory of Alaska, Division Number One, at Ketchikan

No. 1549-KB

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH C. PATTERSON,

Defendant.

INDICTMENT

Vio. Sec. 201, Title 18, U.S.C. (Bribery)

Count I.

The Grand Jury Charges:

That on or about the 19th day of August, 1950, in Division Number One, Territory of Alaska, Joseph C. Patterson did knowingly, wilfully, unlawfully and feloniously offer and give John Roger Lamb the sum of One Hundred Eighty ($180.00) Dollars in lawful money of the United States, said John Roger Lamb being a person acting for and on behalf of the United States in an official function, under and by authority of the Fish and Wildlife Service, United States Department of the Interior, whose duties were to observe the area of Mink Arm, Boca de Quadra, Alaska, then and there closed to commercial fishing for salmon, to report and disclose to officials of said Fish and Wildlife Service and other law enforcement officials and to arrest and cause the arrest and prosecution of, all persons

fishing illegally for salmon in said closed area; knowing said John Roger Lamb was a person acting for and on behalf of the United States in an official function with duties as aforesaid, and with the intention on the part of said Joseph C. Patterson to influence and induce John Roger Lamb to do an act in violation of his lawful duties; that is to say, to unlawfully refrain from and omit to report and disclose to officials of the Fish and Wildlife Service and other law enforcement officials, that said Joseph C. Patterson did fish illegally in said area closed to commercial fishing for salmon, and to refrain from arresting or causing the arrest and prosecution of said Joseph C. Patterson for illegally fishing in said area. [10*]

Count II.

The Grand Jury Further Charges:

That on or about the 21st day of August, 1950, in Division Number One, Territory of Alaska, Joseph C. Patterson did knowingly, wilfully, unlawfully and feloniously offer and give John Roger Lamb the sum of One Hundred ($100.00) Dollars in lawful money of the United States; said John Roger Lamb being a person acting for and on behalf of the United States in an official function, under and by authority of the Fish and Wildlife Service, United States Department of the Interior, whose duties were to observe the area of Mink Arm, Boca de Quadra, Alaska, then and there

*Page numbering appearing at foot of page of original Certified Transcript of Record.

closed to commercial fishing for salmon, to report and disclose to officials of said Fish and Wildlife Service and other law enforcement officials and to arrest and cause the arrest and prosecution of, all persons fishing illegally for salmon in said closed area; knowing the said John Roger Lamb was a person acting for and on behalf of the United States in an official function with duties as aforesaid, and with the intention on the part of said Joseph C. Patterson to influence and induce John Roger Lamb to do an act in violation of his lawful duties, that is to say, to unlawfully refrain from and omit to report and disclose to officials of the Fish and Wildlife Service and other law enforcement officials, that said Joseph C. Patterson did fish illegally in said area closed to commercial fishing for salmon, and to refrain from arresting or causing the arrest and prosecution of said Joseph C. Patterson for illegally fishing in said area.

A True Bill.

/s/ CHAS. MARTIN CARLSON,
Foreman.

/s/ ERNEST E. BAILEY,
Asst. U. S. Attorney.

Witnesses:

JOHN ROGER LAMB,
RICHARD WARNER,
JOHN WENDLER.

Bail $5,000.00.

[Endorsed]: Filed September 29, 1950. [11]

[Title of District Court and Cause.]

DEFENDANT'S PROPOSED INSTRUCTION No. 1

It is well settled that decoys may be used to entrap criminals, and to present opportunity to one intending or willing to commit crime. But decoys are not permissible to ensnare the innocent and law-abiding into the commission of crime. When the criminal design originates, not with the accused, but is conceived in the mind of government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefor.

If the jury are satisfied that prior to the commission of the acts alleged that the defendant never conceived any intention of committing these offenses or any similar offenses, but that the officers of the government incited and by suasion and representations lured him to commit the offenses alleged in order to entrap, arrest, and prosecute the defendant therefor, then these facts are fatal to the prosecution of these offenses, and the defendant is entitled to a verdict of not guilty.

Newman v. United States,
(CCA 4th, 1924) 299 Fed. 128.

Capuano v. United States,
(CCA 1st, 1925) 9 F(2d) 41.

Sorrells v. United States,
287 U. S. 435, 86 ALR 249.

Woo Wai v. United States,
(CCA 9th) 223 Fed. 412.

Refused because covered.

/s/ FOLTA. [25]

[Title of District Court and Cause.]

DEFENDANT'S PROPOSED INSTRUCTION No. 2

As the Government has the burden of proof throughout this trial, if you have any reasonable doubt of the defendant's having been lured by entrapment, as I have heretofore defined that term, into the commission of the offenses charged, when theretofore he had no such intention, he is not guilty of any offense and should be acquitted.

Patton v. United States,
(CCA 8th) 42 F(2d) 68.

Refused because there is no evidence that defendant was "lured."

/s/ FOLTA. [26]

[Title of District Court and Cause.]

DEFENDANT'S PROPOSED INSTRUCTION No. 3

In this case the evidence of character witnesses has been introduced with regard to the general reputation of the defendant for honesty and integrity in the community in which he lives. You are to consider this evidence together with the other evidence in the case. The evidence of such witnesses may, if believed by you, be sufficient to create a reasonable doubt as to the guilt of the defendant.

Refused because it singles out and emphasizes one fact.

/s/ FOLTA. [27]

[Title of District Court and Cause.]

COURT'S INSTRUCTIONS TO THE JURY No. 1

Ladies and Gentlemen of the Jury:

We have now reached the point in the trial of this case where it becomes the duty of the Court to instruct you as to the law that will govern you in your deliberations upon the facts of this case.

When you were accepted as jurors in this case you obligated yourselves by your oaths to well and truly try the matter in issue between the Government of the United States and the defendant, and a

true verdict render according to the law and the evidence as given to you on the trial. That oath means that you will not be swayed by passion, sympathy or prejudice, and that your verdict will be the result of a careful consideration of all the evidence and the instructions of the Court as to the law.

It is not for you to say what the law is or should be regardless of any idea you may have in that respect. It is the exclusive province of the Court to declare the law in these instructions, and it is your duty as jurors to follow them in your deliberations and in arriving at a verdict.

On the other hand it is the exclusive province of the jury to declare the facts in the case, and your decision in that respect, as embodied in your verdict, when arrived at in a regular and legal manner, is final and conclusive upon the Court. Therefore probably the greater ultimate responsibility in the trial of the case rests upon you, because you are the triers of the facts. [29]

No. 2

The indictment charges, in Count I, that the defendant committed the crime of bribery by giving $180 on August 19, 1950, and the same crime, in Count II, by giving $100 on August 21, 1950, to John Roger Lamb, a person acting for and on behalf of the United States in an official function, under and by authority of the Department of the Interior, whose duties were to observe the waters of Mink Arm, Boca de Quadra, Alaska, then and

there closed to commercial fishing for salmon, to report and disclose violations and to arrest and cause the arrest and prosecution of all persons fishing illegally in said closed area, with the intent to influence and induce said Lamb to omit the performance of such duties and to refrain from arresting or causing the arrest and prosecution of the defendant for illegally fishing in said area. [30]

No. 3

Bribery, so far as pertinent to this case, is defined by law as follows:

> "Whoever gives any money to any person acting for or on behalf of the United States or any department thereof, in any official function, under or by authority of any such department, with intent to influence or induce him to do or omit to do any act in violation of his lawful duty shall be fined or imprisoned," [31] etc.

No. 4

The essential elements of the crime charged in Count I are:

> (1) That on or about August 19, 1950, the defendant gave $180 in lawful money of the United States, or some part thereof, to John Roger Lamb.
>
> (2) That John Roger Lamb was then and there a person acting for or on behalf of the United States or the Department of the Interior, in an official function, under or by authority of such department.

(3) That the defendant knew that the said John Roger Lamb was then and there acting as such person.

(4) That the money was given with the intent to influence or induce the said John Roger Lamb to omit to report the defendant or to cause his arrest or prosecution for fishing in violation of the law.

The essential elements of the crime charged in Count II are identical except that the crime is alleged to have been committed on or about two days later.

Ordinarily each essential element of any crime charged must be proved beyond a reasonable doubt before there can be a conviction; but in this case the defendant has admitted all of the elements but contends that he was entrapped. You may therefore find that all the essential elements are proved beyond a reasonable doubt. [32]

No. 5

It is admitted that at all times material in this prosecution the waters of Mink Arm of Boca de Quadra, Alaska, were closed to commercial fishing for salmon and that the witness Lamb was a person acting in an official function for or on behalf of the United States or Department of the Interior and engaged in the performance of the duties set forth in the indictment. You are instructed that at all times material in this prosecution it was the function of the United States, acting through the Department of the Interior to conserve and protect

the commercial fisheries of Alaska for the benefit of all the citizens of the United States by adopting such means, by regulation or otherwise, as it deemed necessary; that among the means adopted was the closure of the waters of Mink Arm, Boca de Quadra, to commercial fishing for salmon and the appointment of John Roger Lamb with authority to prevent such commercial fishing by reporting or arresting or causing the arrest or prosecution of any person fishing or attempting to fish therein. [33]

No. 6

Therefore, if you find from the evidence including the defendant's admissions beyond a reasonable doubt that the defendant, on or about August 19, 1950, gave $180 or any part thereof to John Roger Lamb, then and there a person acting for or on behalf of the United States or the Department of the Interior in any official function, knowing that he was acting in that capacity, with the intent to influence or induce the said Lamb to omit to report a violation of the fisheries law by the defendant, or to omit to arrest or cause the arrest or prosecution of the defendant for such illegal fishing, you should convict him of the offense charged in Count I of the indictment.

Likewise, if you find from the evidence including the admissions of defendant beyond a reasonable doubt that the defendant, on or about August 21, 1950, gave $100 or some part thereof to John Roger Lamb, then and there a person acting for or on behalf of the United States or the Department

of the Interior in any official function, knowing that he was acting in that capacity, with the intent to influence or induce the said Lamb to omit to report a violation of the fisheries law by the defendant or to omit to arrest or cause the arrest or prosecution of the defendant for such illegal fishing, you should convict him of the offense charged in Count II of the indictment.

On the other hand, if you do not so find, or find that the defendant was entrapped or have a reasonable doubt arising from a consideration of all the evidence or lack thereof, you should acquit the defendant. [34]

No. 7

Since the defendant has admitted the acts constituting the offenses charged in the indictment and relies solely on the defense of entrapment, the question whether or not he was entrapped into committing these crimes or either of them is the only question for your consideration and determination.

The prosecution contends that the defendant was merely afforded an opportunity to commit the crimes charged and that he had the intent or the willingness to commit them.

You are instructed that the law does not allow one, for the purpose of obtaining a victim or for the sole purpose of prosecution to generate in the mind of another, who is innocent of any criminal purpose, the intent to commit a crime and thus induce him to commit a crime that he would not have committed or even contemplated but for such inducement. But while officers of the law may not thus

entrap an innocent person into the commission of a crime, they may, if they are informed or suspect that a person has the intent or disposition to commit a crime, not only afford him an opportunity to commit it but also may lay a trap for him by using a decoy or any artifice, strategem or other means and may actually solicit, encourage or cooperate with him in his commission of it. Such being the law, it is not for you to pass on the propriety of this means in apprehending criminals. Accordingly, if the evidence shows a mere proposal to violate the law upon which another acts, it is not sufficient to constitute entrapment. The proposal must have been accompanied by importunities, pleas or persuasion sufficient to overcome the will power and judgment of the other and induce, lure or entice him to commit a crime which he otherwise would not have committed. Whether in this case any such inducement, lure or enticement was made, given or held out by Lamb to the defendant is for you to say. Accordingly, if the defendant proposed bribery or accepted Lamb's proposal for personal gain or because Lamb was about to withdraw and make the offer to another, and not because the defendant was induced, lured or enticed to do so, the defense of entrapment would not be available to him and you should not consider such defense.

The defendant testified that he paid one bribe on August 17th, another on the 18th and the third on the 21st. If you find that the defendant was induced [35] to bribe, not for personal gain, but because his will power and judgment had been over-

come by the inducement offered and that after he had given the first bribe he subsequently gave two more, the defense of entrapment would not be available to him as to the second and third bribes unless you further find that he was still acting under the influence of the inducement, enticement and lure if any to commit the first bribery.

Therefore, if you find from the evidence that the defendant proposed a bribe to Lamb or had the intent or was willing for personal gain to commit the crimes charged, then you should find him guilty regardless of whether Lamb provided him with an opportunity and urged him to commit them or encouraged or cooperated with him in its commission.

On the other hand, if you find that the defendant did not propose bribery in the first instance and was not willing, and had no intent, to commit such crimes or either of them, and that the idea of its commission was implanted in his mind by Lamb and that he was induced, enticed or lured by Lamb to commit them or either of them where otherwise he would not have done so, or if you have a reasonable doubt thereof, arising upon a consideration of all the evidence or lack thereof, you should acquit him. [36]

No. 8

In any criminal case previous good character of the accused may be shown by evidence that his general reputation in the community in which he lives was good. General reputation consists of what the people of the community generally think or say of another and, hence, anyone who knows

what the general reputation of a person is in the community in which he lives may testify thereto. But the testimony must be based not on what a few people say but on what people generally say.

Evidence of good reputation is admitted not for the purpose of showing that the one accused did not commit the crime charged but for the purpose of showing the improbability that he would do so. It is for you to say whether the defendant's good general reputation in Ketchikan prior to the commission of the offenses charged has been proved. If you find that it has, you may consider it along with all the other testimony and give it such weight as you think it entitled to, remembering that persons of good character may nevertheless commit crimes. [37]

No. 9

The law presumes every person charged with crime to be innocent and, hence, the defendant is entitled to the benefit of this presumption until it has been overcome by evidence beyond a reasonable doubt. This rule as to the presumption of innocence is a humane provision of the law intended to guard against the conviction of innocent persons, but it is not intended to prevent the conviction of any person who is in fact guilty or to aid the guilty to escape punishment. Hence, it follows that the defendant does not have to prove his innocence, and that the burden of proving his guilt is upon the prosecution. [38]

No. 10

A reasonable doubt is not just any vague, fanciful or imaginary doubt, but one that arises after a careful consideration of all the evidence or from a lack thereof. It is a doubt based on reason, and not on a bare possibility of innocence, or on sympathy or a desire to escape from an unpleasant duty. Everything relating to human affairs and depending on human testimony is open to some possible doubt, and this is true of guilt.

If after carefully analyzing, comparing and weighing all the evidence, you have a settled conviction or belief of defendant's guilt, amounting to a moral certainty, such as you would be willing to act upon in matters of the highest importance relating to your own affairs, then you have no reasonable doubt. [39]

No. 11

Subject to the law as contained in these instructions, you are also the exclusive judges of the credibility of the witnesses and of the effect and value of the evidence. The term "witnesses" as used in this instruction includes the defendant.

You are, however, instructed that your power of judging the effect of evidence is not arbitrary but is to be exercised by you with legal discretion and in subordination to the rules of evidence. Evidence is to be estimated not only by its own intrinsic weight but also according to the evidence which it is in the power of one side to produce and of the other to contradict and, therefore, if weaker and less satisfactory evidence is offered when it appears

that stronger and more satisfactory evidence was within the power of the party offering it, such evidence should be viewed with distrust. Oral admissions of the defendant, if any, should be viewed with caution.

In determining the credibility of witnesses and the weight to be given their testimony, you should decide what testimony is to be believed in the same way as you would decide whether to believe something told you out of court. You size up the witness in court in the same way as an informant out of court, observe his appearance and demeanor, note his intelligence, whether he is candid and fair, whether he has an interest in the outcome of the trial, what motive he may have for testifying as he did, the opportunity he had to observe or learn or remember the facts to which he testified, the probability or improbability of his testimony, his bias or prejudice against or inclination to favor either party, his character as shown by the evidence, the extent to which he is corroborated or contradicted and all the other facts and circumstances which shed light on his credibility and the weight of his testimony. When a witness has a strong personal interest in the outcome of a case, the temptation to lie, or to color, distort or withhold the truth may likewise be strong. Notwithstanding that, however, you may find that he has told the truth. What has just been said concerning interest in the outcome of a case is likewise applicable to bias or prejudice against or a disposition to favor, either party. In other words, you should bring to bear upon your

consideration of the evidence or lack of evidence in this case all of the common knowledge of men and affairs which you, as reasonable [40] human beings, have and exercise in every day affairs of life. Accordingly, you should draw from the evidence in this case all deductions which appear to you to flow logically from such evidence.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number or against a presumption or other evidence satisfying your minds. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on opposing sides, and that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence. The direct evidence of one witness whom you find to be entitled to full credit is sufficient for the proof of any fact in this case. A witness may be impeached by the character of his testimony, or by evidence affecting his character for truth, honesty or integrity, or by contradictory evidence. A witness may also be impeached by evidence that at other times he has made statements inconsistent with his present testimony as to any matter material to this case; or by proof that he has been convicted of a crime. However, the impeachment of a witness

does not necessarily mean that his testimony is completely deprived of value or that its value is destroyed in any degree. The effect, if any of the impeachment upon the credibility of the witness is for you to determine. A witness wilfully false in one part of his testimony may be distrusted in other parts. Discrepancies in a witness' testimony or between his testimony and that of others, if there were any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance. But a wilful falsehood always is a matter of importance and should be seriously considered. Whenever it is possible you will reconcile conflicting or inconsistent testimony, but where it is not possible to [41] do so, you should give credence to that testimony which, under all the facts and circumstances of the case, appeals to you as the most worthy of belief.

You are also instructed that the opening statements and the arguments of counsel are not evidence, and they are not binding upon you. You may, however, be guided by them if you find that they are based on the admitted evidence and appeal to your reason and judgment, and are not in conflict with the law as set forth in these instructions.

I also instruct you that you should not concern

yourselves with the matter of punishment. That is the exclusive concern of the Court. You are not responsible for the consequences of your verdict but only for its truth so far as the truth is determinable by you. [42]

No. 12

In considering your verdict you are instructed that any testimony which has been ordered stricken by the Court should not be considered by you for any purpose. [43]

No. 13

The law makes the defendant in a criminal action a competent witness but subjects his testimony to the same tests as that of any other witness. In determining his credibility, you have a right to take into consideration the fact that he is the defendant and that his interest in the result of your verdict is usually greater than that of any other witness, and give his testimony, considered in connection with all the other evidence, such weight as you believe it entitled to. [44]

No. 14

There is testimony in this case that the defendant has been previously convicted of other crimes. The Court instructs you that such evidence is not to be considered by you as evidence of the defendant's guilt of the crime for which he is now on trial, but is only to be considered by you in determining his credibility as a witness and the weight and value that you may give to his testimony. Like-

wise proof that any witness other than the defendant has been convicted of a crime or crimes, may be considered by you in determining the credibility of such witness and the weight and value of his testimony. [45]

No. 15

Jurors are impaneled for the purpose of agreeing upon a verdict, if they can conscientiously do so, so that there may be an end to litigation. In each case the verdict must be unanimous. But while the verdict should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conferences and discussion in the jury room. It is not intended that a juror should go to the jury room with a fixed determination that the verdict shall represent his opinion of the case at that moment. Nor is it intended that he should close his ears to the arguments of other jurors. The very object of the jury system is to secure unanimity by a comparison of the views of, and by discussion and argument among, the jurors themselves. Hence, while no juror should yield a sincere conviction founded upon the evidence and the law as laid down in these instructions merely to agree with the jury, every juror, in considering the case with fellow jurors, should lay aside all undue pride and vanity of personal opinion and listen, with a disposition to be convinced, to the opinions and arguments of the others and a desire to get at the truth in order that a just verdict, representing the collective judgment of the entire jury, may be reached.

Accordingly, no juror should hesitate to change the opinion he has entertained or expressed, if honestly convinced that such opinion is erroneous, even though in so doing he adopts the views and opinions of other jurors. But before a verdict of guilty can be rendered, each of you must be able to say, in answer to your individual conscience, that you have arrived at a settled conviction, based upon the law and the evidence of the case and nothing else, that the defendant is guilty. [46]

No. 16

Upon retiring to your jury room you will select one of your number foreman, who will speak for you and sign the verdict unanimously agreed upon.

You will take with you to the jury room the indictment, the exhibits and these instructions, together with two forms of verdict, each of which has a blank space before the word "guilty." If you find the defendant guilty, you should draw a line through the blank space. If you find him not guilty, you must write the word "not" in such blank space. Before reaching a verdict you will carefully consider and compare all the testimony.

If you agree upon a verdict during business hours, that is between 9:00 a.m. and 5:00 p.m., you should have your foreman date and sign it and then return it immediately into open court in the presence of the entire jury, together with the indictment, the exhibits and these instructions. If, however, you agree upon a verdict after business hours, that is, after 5:00 p.m. one day and before 9:00 a.m.

the following day, you should similarly have your foreman date and sign it and seal it in the envelope accompanying these instructions. The foreman will then keep it in his possession unopened and the jury may separate and go to their homes, but all of you must be in the jury box when the court next convenes at 10:00 a.m. when the verdict will be received from you in the usual way.

Given at Ketchikan, Alaska, this 25th day of October, 1950.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed October 26, 1950. [47]

[Title of District Court and Cause.]

COURT'S SUPPLEMENTAL INSTRUCTIONS TO THE JURY

No. 1

Ladies and Gentlemen of the Jury:

Upon reading the note from the foreman, I discovered that I omitted to give you an instruction which is given in all cases and which is as follows:

You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and you should not single out one particular instruction and consider it by itself, to the exclusion of all the other instructions.

As you have been heretofore instructed, your duty

is to determine the facts of the case from the evidence submitted, and to apply to these facts the law as given to you by the Court in these instructions. The Court does not, either in these instructions or otherwise, wish to indicate how you shall find the facts or what your verdict shall be, or to influence you in the exercise of your right and duty to determine for yourselves the effect of evidence you have heard or the credibility of witnesses, because the responsibility for the determination of the facts in this case rests upon you and upon you alone.

No. 2

You will, therefore, observe that it would be improper for you to isolate one or two sentences and decide the case upon such sentences. As you have heretofor been instructed, there is but one question in this case and that is whether the defendant was entrapped in the legal sense. This makes the case a simple one and the jury should have no difficulty in reaching a verdict in a short time. To clarify and sum up the instruction already given you on this point, you are further instructed that the defense of entrapment is not available to the defendant if:

The idea of committing the crimes charged or either of them originated in the mind of the defendant or he made the first proposal to pay a bribe in return for permission to fish in a closed area. Likewise, the defense of entrapment would not be available to the defendant, even though the idea originated in the mind of Lamb and he made the first proposal to commit the crimes charged or either of

them, if notwithstanding, the defendant voluntarily chose to accept the proposal for personal gain. In other words, if you find such to be the case, it would not be unlike two criminally inclined persons who, after discussing the commission of crimes and the profit to be derived therefrom, decide to commit them.

On the other hand, the defense of entrapment is available to the defendant if the idea of committing these crimes or either of them originated in the mind of Lamb and the defendant had no intent to commit or even thought of committing such crimes and if, thereafter, the witness Lamb, by importunities, pleas, persuasion or argument, overcome the will power or judgment of the defendant and induced or enticed or lured the defendant into committing the crimes charged or either of them, primarily for the accommodation of Lamb.

Whether the defendant's mind and will were thus overcome or whether he acted solely from a desire for personal gain, is the crucial question upon which the case turns. If you find that it was the desire for personal gain that motivated the defendant, you should convict him, but if you find that his mind and will were overcome, or have a reasonable doubt thereof, you should acquit.

Given at Ketchikan, Alaska this 26th day of October, 1950.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed October 26, 1950.

[Title of District Court and Cause.]

COURT'S SECOND SUPPLEMENTAL INSTRUCTIONS TO THE JURY

No. 1

Since the defendant has admitted the acts constituting the offenses charged in the indictment and relies solely on the defense of entrapment, the question whether or not he was entrapped into committing these crimes or either of them is the only question for your consideration and determination.

The prosecution contends that the defendant was merely afforded an opportunity to commit the crimes charged and that he had the intent or the willingness to commit them.

You are instructed that the law does not allow one, for the purpose of obtaining a victim or for the sole purpose of prosecution to generate in the mind of another, who is innocent of any criminal purpose, the intent to commit a crime and thus induce him to commit a crime that he would not have committed or even contemplated but for such inducement. But while officers of the law may not thus entrap an innocent person into the commission of a crime, they may, if they are informed or suspect that a person has the intent or disposition to commit a crime, not only afford him an opportunity to commit it but also may lay a trap for him by using a decoy or an artifice, stratagem or other means and may actually solicit, encourage or cooperate with him in his commission of it. Such being the law,

it is not for you to pass on the propriety of this means of apprehending criminals. Accordingly, if the evidence shows a mere proposal to violate the law upon which another acts, it is not sufficient to constitute entrapment. The proposal must have been accompanied by importunities, pleas or persuasion sufficient to overcome the will power and judgment of the other and induce, lure or entice him to commit a crime which he otherwise would not have committed. Whether in this case any such inducement, lure or enticement was made, given or held out by Lamb to the defendant is for you to say.

The defendant testified that he paid one bribe on August 17th, another on the 18th and the third on the 21st. If you find that the defendant was induced to bribe, not for personal gain, but because his will power and judgment had been overcome by the inducement offered and that after he had given the first bribe he subsequently gave two more, the defense of entrapment would not be available to him as to the second and third bribes unless you further find that he was still acting under the influence of the inducement, enticement and lure to commit the first bribery.

If you find from the evidence that the defendant offered a bribe to Lamb or had the intent to commit the crimes charged or either of them, or accepted Lamb's proposal, not because he was induced to accept it but from a desire for personal gain or from the fear of losing an opportunity for profit, then the defense of entrapment would not be available and you should find the defendant guilty re-

gardless of whether Lamb urged, encouraged or cooperated with him in the commission of the crimes involved.

On the other hand, if you find that the defendant did not offer a bribe to Lamb in the first instance and had no intent to commit the crimes charged or either of them and that the idea of the commission was implanted in his mind by Lamb and that by persuasion, representation or suggestion, Lamb overcame the will and better judgment of the defendant and induced, enticed or lured him into the commission of the crimes charged or either of them, or if you have a reasonable doubt thereof, you should acquit him.

The test is whether the defendant acted voluntarily and chose to commit the crimes charged, or either of them, from a desire for personal gain or from the fear of losing an opportunity to profit or whether his will power and better judgment were so overcome by Lamb, that he was induced to commit the crimes charged without having had any previous intention to do so. To illustrate, if "A," a custodian of government property, tells "B" that he will allow him to steal for a percentage of the profits from the sale thereof, then there would be no entrapment even though "A" told "B" that it was an excellent opportunity for making a lot of money. On the other hand, if "A" told "B" that he was in dire financial straits, that his family was on the verge of starvation and he was greatly in debt and begged him to steal goods from his custody and by such means induced "B" to steal for the accommodation of

"A," which otherwise "B" would not even have contemplated, it would be entrapment.

This instruction supersedes original instruction No. 7 and Supplemental Instruction No. 2.

Given at Ketchikan, Alaska, this 26th day of October, 1950.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed October 26, 1950.

[Title of District Court and Cause.]

VERDICT No. I

We, the Jury empaneled and sworn in the above-entitled cause, find the defendant ..... guilty of bribery as charged in Count I of the Indictment.

Dated at Ketchikan, Alaska this 26 day of October, 1950.

/s/ JOHN H. DOYLE,
Foreman.

[Endorsed]: Filed October 26, 1950.

[Title of District Court and Cause.]

VERDICT No. II

We, the Jury empaneled and sworn in the above-entitled cause, find the defendant ..... guilty of bribery as charged in Count II of the Indictment.

Dated at Ketchikan, Alaska this 26 day of October, 1950.

/s/ JOHN H. DOYLE,
Foreman.

[Endorsed]: Filed October 26, 1950.

In the District Court for the Territory of Alaska
Division Number One, at Ketchikan

No. 1549-KB

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOSEPH C. PATTERSON,
Defendant.

JUDGMENT AND COMMITMENT

Now, to wit, on this 30th day of October, 1950, this matter came before the Court for the imposition of sentence on the above-named defendant, Joseph C. Patterson, upon the verdict of the Jury whereby he was found guilty on October 26, 1950, of the crime of Bribery, in violation of Section 201, Title 18,

United States Code, as charged in Counts One and Two of the Indictment heretofore on the 29th day of September, 1950, returned by the Grand Jury and filed herein; the defendant being present and represented by his counsel, Wendell Kay; Ernest E. Bailey, Assistant United States Attorney, appearing for and on behalf of the United States; the defendant being asked if he had any good and sufficient reason to state why sentence should not now be imposed upon him, to which he offered none, and the Court being fully advised in the premises,

Hereby Orders, Adjudges and Decrees that it is the Judgment of the Court that said defendant, Joseph C. Patterson is guilty of the crime of Bribery, in violation of Section 201, Title 18, United States Code, as charged in Counts One and Two of the Indictment, and it is the sentence of the Court that the defendant be imprisoned in the Federal Penitentiary at McNeil Island, Washington or in such other institution as the Attorney General of the United States may direct for a period of Two (2) Years on Count One, and that the defendant be imprisoned for a period of Two (2) Years on Count Two, said sentences to run concurrently; and furthermore, the defendant pay a fine of Three Hundred ($300.00) Dollars on each count; and that the defendant, Joseph C. Patterson stand committed until the sentences herein imposed are fully executed, and

It Is Further Ordered that the Clerk of this Court deliver a certified copy of this Judgment and Commitment to the United States Marshal or other

qualified officer, and that the same shall serve as a commitment herein.

Done in open court, this 30th day of October, 1950.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed November 1, 1950.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the defendant, Joseph C. Patterson, and moves the Court to grant him a new trial, for the following reasons:

1. The Court erred in denying defendant's motion for acquittal at the conclusion of the Government's evidence and at the conclusion of all the evidence.

2. The verdict is contrary to the weight of the evidence.

3. The verdict is not supported by substantial evidence.

4. Instruction No. 7, given by the Court as follows:

> "* * * But while the officers of the law may not thus entrap an innocent person into the commission of a crime, they may, if they are informed or suspect that a person has the intent or disposition to commit a crime, not only afford him an opportunity to commit it but

also may lay a trap for him by using a decoy or any artifice, stratagem or other means and may actually solict, encourage or cooperate with him in his commission of it. Such being the law, it is not for you to pass on the propriety of this means in apprehending criminals. Accordingly, if the evidence shows a mere proposal to violate the law upon which another acts, it is not sufficient to constitute entrapment. The proposal must have been accompanied by importunities, pleas or persuasion sufficient to overcome the will power and judgment of the other and induce, lure or entice him to commit a crime which he otherwise would not have committed. Whether in this case any such inducement, lure or enticement was made, given or held out by Lamb to the defendant is for you to say. Accordingly, if the defendant proposed bribery or accepted Lamb's proposal for personal gain or because Lamb was about to withdraw and make the offer to another, and not because the defendant was induced, lured or enticed to do so, the defense of entrapment would not be available to him and you should not consider such defense.

* * *

"Therefore, if you find from the evidence that the defendant proposed a bribe to Lamb or had the intent or was willing to commit the crimes charged, then you should find him guilty regardless of whether Lamb provided him with

an opportunity and urged him to commit them or encourage or cooperated with him in its commission."

and especially the underlined portion thereof, was erroneous, for the reason that said instructions do not correctly state the law of entrapment.

5. Instruction No. 2 of the Court's supplemental instructions to the Jury, reading as follows:

"* * * As you have heretofore been instructed, there is but one question in this case and that is whether the defendant was entrapped in the legal sense. This makes the case a simple one and the jury should have no difficulty in reaching a verdict in a short time. To clarify and sum up the instruction already given you on this point, you are further instructed that the defense of entrapment is not available to the defendant if:

"(1) The idea of committing the crimes charged or either of them originated in the mind of the defendant or he made the first proposal to pay a bribe in return for permission to fish in a closed area. Likewise, the defense of entrapment would not be available to the defendant, even though the idea originated in the mind of Lamb and he made the first proposal to commit the crimes charged or either of them, if notwithstanding, the defendant voluntarily chose to accept the proposal for personal gain. In other words, if you find such to be the case, it would not be unlike two crimi-

nally inclined persons, who, after discussing the commission of crimes and the profit to be derived therefrom, decide to commit them.

"On the other hand, the defense of entrapment is available to the defendant if the idea of committing these crimes or either of them originated in the mind of Lamb and the defendant had no intent to commit or even thought of committing, such crimes, and if, thereafter, the witness Lamb, by importunities, pleas, persuasion or argument, overcame the will power or judgment of the defendant and induced or enticed or lured the defendant into committing the crimes charged or either of them, primarily for the accommodation of Lamb.

"Whether the defendant's mind and will were thus overcome or whether he acted solely from a desire for personal gain, is the crucial question upon which the case turns. If you find that it was the desire for personal gain that motivated the defendant, you should convict him, but if you find that his mind and will were overcome, or have a reasonable doubt thereof, you should acquit."

and especially the underlined portion thereof, was erroneous for the reason that said instruction does not state correctly the law of entrapment.

6. Instruction No. 1 of the Court's second supplemental instruction to the Jury, reading as follows:

"* * * The proposal must have been accompanied by importunities, pleas or persuasion sufficient to overcome the will power and judgment of the other and induce, lure or entice him to commit a crime which he otherwise would not have committed. Whether in this case any other inducement, lure or enticement was made, given or held out by Lamb to the defendant is for you to say.

"The defendant testified that he paid one bribe on August 17th, another on the 18th and the third on the 21st. If you find that the defendant was induced to bribe, not for personal gain, but because his will power and judgment had been overcome by the inducement offered and that after he had given the first bribe he subsequently gave two more, the defense of entrapment would not be available to him as to the second and third bribes unless you further find that he was still acting under the influence of the inducement, enticement and lure to commit the first bribery.

"If you find from the evidence that the defendant offered a bribe to Lamb or had the intent to commit the crimes charged or either of them, accepted Lamb's proposal, not because he was induced to accept it but from a desire for personal gain or from the fear of losing an opportunity for profit, then the defense of entrapment would not be available and you should find the defendant guilty regardless of whether

Lamb urged, encouraged or cooperated with him in the commission of the crimes involved.

* * *

"The test is whether the defendant acted voluntarily and chose to commit the crimes charged, or either of them, from a desire for personal gain or from the fear of losing an opportunity to profit or whether his will power and better judgment were so overcome by Lamb that he was induced to commit the crimes charged without having had any previous intention to do so. To illustrate, if "A," a custodian of government property tell "B" that he will allow him to steal for a percentage of the profits from the sale thereof, then there would be no entrapment even though "A" told "B" that it was an excellent opportunity for making a lot of money. On the other hand, if "A" told "B" that he was in dire financial straits, that his family was on the verge of starvation and he was greatly in debt and begged him to steal goods from his custody and by such means induced "B" to steal for the accommodation of "A," which otherwise "B" would not even have contemplated, it would be entrapment."

and especially the underlined portion thereof, was erroneous for the reason that said quoted instructions do not correctly state the law of entrapment, and that the same were highly prejudicial to the defendant.

7. Other manifest error appearing of record, to

which objection was taken and exception reserved.

Dated at Ketchikan, Alaska, this 30th day of October, 1950.

CUDDY & KAY,

ZIEGLER, KING & ZIEGLER,

Attorneys for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 30, 1950.

MINUTE ORDER

10:00 A.M.—Friday, November 3, 1950

[Title of Cause.]

This matter came before the court for hearing on defendant's motion for a new trial and a supplemental motion for a new trial. The court directed that the supplemental motion for a new trial and the affidavits attached thereto be stricken from the file. Robert H. Ziegler briefly argued the Motion for a New Trial, which the court denied and defendant thereupon filed his notice of appeal.

The above excerpt taken from page 26, Volume 13 of Ketchikan Civil & Criminal Journal.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: Joseph C. Patterson, Box 945, Ketchikan, Alaska.

Names and addresses of appellant's attorneys: Cuddy & Kay, Anchorage, Alaska. Ziegler, King & Ziegler, Box 1079, Ketchikan, Alaska.

Offense: Bribery.

Concise statement of judgment or order, giving date, and any sentence: Judgment entered as of October 30, 1950, finding the appellant guilty of the offense of bribery, in violation of Section 201, Title 18, United States Code, as charged in the indictment, and sentencing him to serve two years' imprisonment in McNeil Island Penitentiary in the State of Washington, or such other penal institution as the Attorney General of the United States may direct, on each of two counts, to run concurrently, and to pay a fine of Three Hundred ($300) Dollars on each count. Appellant admitted to bail.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above judgment.

Dated at Ketchikan, Alaska, November 3, 1950.

CUDDY & KAY,
ZIEGLER, KING & ZIEGLER,
Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed November 3, 1950.

[Title of District Court and Cause.]

APPEAL BOND

A judgment having been given on the 30th day of October, 1950, in the above-entitled court and cause, whereby Joseph C. Patterson, the above-named defendant, was sentenced to serve in the United States Penitentiary at McNeil Island, Washington, or in such other institution as the Attorney General of the United States may direct, for a period of two (2) years, on two counts, to run concurrently, and was fined Three Hundred ($300) Dollars on each of two counts of bribery; and he having appealed from said judgment and been duly admitted to bail in the sum of Seven Thousand, Five Hundred ($7,500) Dollars,

We, J. C. Strand, of Ketchikan, Alaska, by occupation fisherman, and H. F. Schaub, of Ketchikan, Alaska, by occupation a manufacturer of concrete products, hereby undertake that the above-named Joseph C. Patterson shall in all respects abide and perform the orders and judgments of the appellate court upon the appeal; or if he fail to do so in any particular, that we will severally pay to the United States of America the sum of Seven Thousand, Five Hundred ($7,500) Dollars in lawful money of the United States.

Dated at Ketchikan, Alaska, this 30th day of October, 1950.

/s/ J. C. STRAND,

/s/ H. F. SCHAUB.

Signed and acknowledged before me this 30th day of October, 1950.

[Seal] /s/ P. J. GILMORE,
United States Commissioner for the Precinct of Ketchikan, Alaska.

United States of America,
Territory of Alaska—ss.

J. C. Strand, being first duly sworn, on oath deposes and says:

I am a resident and inhabitant of the Precinct of Ketchikan, First Division, Territory of Alaska, and am not an attorney, marshal, deputy marshal, clerk of court or other officer of any court. I am worth the sum of $7,500 over and above all my just debts and liabilities, exclusive of property exempt from execution.

/s/ J. C. STRAND.

Subscribed and sworn to before me this 30th day of October, 1950.

[Seal] /s/ P. J. GILMORE,
United States Commissioner for the Precinct of Ketchikan, Alaska.

United States of America,
Territory of Alaska—ss.

H. F. Schaub, being first duly sworn, on oath deposes and says:

I am a resident and inhabitant of the Precinct of Ketchikan, First Division, Territory of Alaska, and

am not an attorney, marshal, deputy marshal, clerk of court or other officer of any court. I am worth the sum of $7,500 over and above all my just debts and liabilities, exclusive of property exempt from execution.

/s/ H. F. SCHAUB.

Subscribed and sworn to before me this 30th day of October, 1950.

[Seal] /s/ P. J. GILMORE,
United States Commissioner for the Precinct of Ketchikan, Alaska

[Endorsed]: Filed Oct. 30, 1950.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know all men by these presents That we, Joseph C. Patterson, the above-named defendant, as principal, and William Tatsuda, of Ketchikan, Alaska, a merchant, as surety, are held and firmly bound unto the United States of America in the sum of Two Hundred Fifty ($250) Dollars, lawful money of the United States of America, for the payment of which well and truly to be made we, and each of us, bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Signed, sealed and dated at Ketchikan, Alaska, this 21st day of November, 1950.

The condition of the above obligation is such that whereas the above-named defendant and principal was, on the 30th day of October, 1950, sentenced in the above-entitled court and cause to serve in the United States Penitentiary at McNeil Island, Washington, or in such other institution as the Attorney General of the United States may direct, for a period of two years on each of two counts of bribery, to run concurrently, and fined Three Hundred ($300) Dollars on each of two counts; and he having appealed from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco:

Now, Therefore, If the said Joseph C. Patterson shall prosecute his said appeal to effect and shall pay all costs that may be adjudged against him if he fail to make good his appeal, then this obligation to become null and void; otherwise to be and remain in full force and effect.

/s/ JOSEPH C. PATTERSON,
Principal.

/s/ WILLIAM TATSUDA,
Surety.

Taken and acknowledged before me this 21st day of November, 1950.

[Seal] /s/ P. J. GILMORE,
United States Commissioner for the Precinct of Ketchikan, Alaska.

United States of America,
Territory of Alaska—ss.

William Tatsuda, whose name is subscribed to the foregoing bond as a surety, being first duly sworn, on oath deposes and says:

That he is a resident of the Territory of Alaska and over the age of twenty-one years. That he is not an attorney or counselor at law, clerk, marshal or other officer of any court. That he is worth the sum of Five Hundred ($500) Dollars in lawful money of the United States of America, over and above all his just debts and obligations, and exclusive of property exempt from execution.

/s/ WILLIAM TATSUDA.

Subscribed and sworn to before me this 21st day of November, 1950.

[Seal] /s/ P. J. GILMORE,
United States Commissioner for the Precinct of Ketchikan, Alaska.

[Endorsed]: Filed Nov. 22, 1950.

[Title of District Court and Cause.]

MOTION FOR ORDER AND ORDER EXTENDING TIME FOR FILING TRANSCRIPT OF RECORD AND DOCKETING CAUSE IN APPELLATE COURT

Comes now the above-named defendant, and moves the Court for an order extending the time for filing the transcript of record and docketing the within cause in the appellate court for the period of 30 days for the reason that the court reporter is unable to prepare a transcript of the evidence within the forty days provided by law for filing the transcript of record and docketing the cause on appeal.

This motion is based upon the record and files herein, and upon the statements of the said court reporter available in support of this motion.

Dated: Anchorage, Alaska, Dec. 8, 1950.

/s/ WENDELL P. KAY,
Attorneys for Defendant.

Order

On reading and filing the above motion, It Is Ordered that the time for filing the transcript of record and docketing the within cause on appeal in the appellate court be, and it is hereby extended for the period of 30 days.

Done in open court, at Anchorage, Alaska, the 8 day of Dec. 1950.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed Dec. 8, 1950.

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of the Above-Entitled Court, at Ketchikan, Alaska:

Please prepare and transmit to the United States Court of Appeals for the Ninth Circuit, to be filed and docketed in said appellate court, within the time provided by law, for use on appeal in the above-entitled action, the following transcript of record on appeal:

1. Indictment.
2. Verdict.
3. Judgment and commitment.
4. Motion for new trial.
5. Order denying motion for new trial.
6. Notice of appeal.
7. Reporter's original transcript of the trial, properly certified, including all evidence, exhibit Plf's No. 1 and instructions, the proposed instructions for the defendant and rulings thereon, and ob-

jections to instructions; but not including opening statements of counsel, examination of jurors, or arguments of counsel.

8. Motion and order extending time for filing transcript of record and docketing cause in appellate court, entered December 8, 1950.

9. This praecipe.

Dated: Ketchikan, Alaska, December 26, 1950.

CUDDY & KAY,

ZIEGLER, KING & ZIEGLER,
Attorneys for Appellant.

[Endorsed]: Filed December 28, 1950.

[Title of District Court and Cause.]

MOTION FOR SUPPLEMENTAL ORDER, AND SUPPLEMENTAL ORDER EXTENDING TIME FOR FILING TRANSCRIPT OF RECORD AND DOCKETING CAUSE IN APPELLATE COURT

Comes now the above-named defendant, and moves the Court for a supplemental order extending the time for filing the transcript of record and docketing the within cause in the appellate court, for the period of an additional fifteen (15) days from January 7, 1951, on which day the first thirty (30) days' extension heretofore obtained expired, for the reason that the Court Reporter is, as of this date, un-

able to prepare a transcript of the evidence within the time granted by the thirty-day extension for filing the transcript of record and docketing the cause on appeal.

This motion is based upon the record and files herein, and upon the statements of the said court reporter available in support of this motion.

Dated: Ketchikan, Alaska, January 3, 1951.

CUDDY & KAY,

ZIEGLER, KING & ZIEGLER,
Attorneys for Defendant.

SUPPLEMENTAL ORDER

On reading and filing the above supplemental motion, It Is Ordered That the time for filing the transcript of record and docketing the within cause on appeal in the appellate court be, and it is hereby, extended for the period of fifteen (15) days from January 7, 1951.

Done in open court, at Juneau, Alaska, the 4th day of January, 1951.

/s/ GEORGE W. FOLTA,
District Judge.

Copy received 1/2/51.

[Endorsed]: Filed Jan. 4, 1951.

[Title of District Court and Cause.]

SUPPLEMENTAL PRAECIPE

To the Clerk of the Above-Entitled Court, at Ketchikan, Alaska:

Please prepare and transmit to the United States Court of Appeals for the Ninth Circuit, to be filed and docketed in said appellate court, within the time provided by law, for use on appeal in the above-entitled action, the following additions to the transcript of record on appeal:

10. Supplemental motion and supplemental order extending time for filing transcript of record and docketing cause in appellate court, entered January 4, 1951.

11. This supplemental praecipe.

Dated: Ketchikan, Alaska, January 16, 1951.

CUDDY & KING,

ZIEGLER, KING & ZIEGLER,
Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed January 16, 1951.

[Title of District Court and Cause.]

DESIGNATING ENTIRE RECORD TO BE PRINTED, AND STATEMENT OF POINTS

Comes now the above-named appellant, Joseph C. Patterson, and respectfully designates the entire record on appeal to be printed for consideration on appeal; and submits the following statement of points on which he intends to rely on his appeal:

1. The Court erred in denying defendant's motion for a judgment of acquittal, made at the close of the evidence offered by the Government.

2. The Court erred in denying defendant's motion for a judgment of acquittal, made at the close of all the evidence.

3. The following portion of Instruction No. 7 given by the Court was erroneous in that it fails to state correctly the law of entrapment, especially as regards monetary motivations of the defendant:

> "* * * But while the officers of the law may not thus entrap an innocent person into the commission of a crime, they may, if they are informed or suspect that a person has the intent or disposition to commit a crime, not only afford him an opportunity to commit it but also may lay a trap for him by using a decoy or any artifice, stratagem or other means and may actually solicit, encourage or cooperate with him in his commission of it. Such being the law, it is not for you to pass on the propriety of this means in apprehending crim-

inals. Accordingly, if the evidence shows a mere proposal to violate the law upon which another acts, it is not sufficient to constitute entrapment. The proposal must have been accompanied by importunities, pleas or persuasion sufficient to overcome the will power and judgment of the other and induce, lure or entice him to commit a crime which he otherwise would not have committed. Whether in this case any such inducement, lure or enticement was made, given or held out by Lamb to the defendant is for you to say. Accordingly, if the defendant proposed bribery or accepted Lamb's proposal for personal gain or because Lamb was about to withdraw and make the offer to another, and not because the defendant was induced, lured or enticed to do so, the defense of entrapment would not be available to him and you should not consider such defense.

* * *

"Therefore, if you find from the evidence that the defendant proposed a bribe to Lamb or had the intent or was willing to commit the crimes charged, then you should find him guilty regardless of whether Lamb provided him with an opportunity and urged him to commit them or encouraged or cooperated with him in its commission."

4. The following portion of Instruction No. 2 of the Court's supplemental instructions was erron-

eous in that it holds, in effect, that if the defendant committed the offense with which he was charged, for personal gain rather than because his will power was overcome by persuasion, then the defense of entrapment was not available:

> "* * * As you have heretofore been instructed, there is but one question in this case and that is whether the defendant was entrapped in the legal sense. This makes the case a simple one and the jury should have no difficulty in reaching a verdict in a short time. To clarify and sum up the instruction already given you on this point, you are further instructed that the defense of entrapment is not available to the defendant if:
>
> "(1) The idea of committing the crimes charged or either of them originated in the mind of the defendant or he made the first proposal to pay a bribe in return for permission to fish in a closed area. Likewise, the defense of entrapment would not be available to the defendant, even though the idea originated in the mind of Lamb and he made the first proposal to commit the crimes charged or either of them, if notwithstanding, the defendant voluntarily chose to accept the proposal for personal gain. In other words, if you find such to be the case, it would not be unlike two criminally inclined persons, who, after discussing the commission of crimes and the profit to be derived therefrom, decide to commit them.
>
> "On the other hand, the defense of entrap-

ment is available to the defendant if the idea of committing these crimes or either of them originated in the mind of Lamb and the defendant had no intent to commit or even thought of committing, such crimes, and if, thereafter, the witness Lamb, by importunities, pleas, persuasion or argument, overcame the will power or judgment of the defendant and induced or enticed or lured the defendant into committing the crimes charged or either of them, primarily for the accommodation of Lamb.

"Whether the defendant's mind and will were thus overcome or whether he acted solely from a desire for personal gain, is the crucial question upon which the case turns. If you find that it was the desire for personal gain that motivated the defendant, you should convict him, but if you find that his mind and will were overcome, or have a reasonable doubt thereof, you should acquit."

5. The following portion of Instruction No. 1 of the Court's second supplemental instruction was prejudicial and erroneous in that it likewise holds in effect that if the defendant were motivated by a desire for personal gain, such motivation constituted insufficiency of inducement, so as to make unavailable to the defendant the defense of entrapment:

"* * * The proposal must have been accompanied by importunities, pleas or persuasion sufficient to overcome the will power and

judgment of the other and induce, lure or entice him to commit a crime which he otherwise would not have committed. Whether in this case any such inducement, lure or enticement was made, given or held out by Lamb to the defendant is for you to say.

"The defendant testified that he paid one bribe on August 17th, another on the 18th and the third on the 21st. If you find that the defendant was induced to bribe, not for personal gain, but because his will power and judgment had been overcome by the inducement offered and that after he had given the first bribe he subsequently gave two more, the defense of entrapment would not be available to him as to the second and third bribes unless you further find that he was still acting under the influence of the inducement, enticement and lure to commit the first bribery.

"If you find from the evidence that the defendant offered a bribe to Lamb or had the intent to commit the crimes charged or either of them, accepted Lamb's proposal, not because he was induced to accept it but from a desire for personal gain or from the fear of losing an opportunity for profit, then the defense of entrapment would not be available and you should find the defendant guilty regardless of whether Lamb urged, encouraged or cooperated with him in the commission of the crimes involved.

* * *

"The test is whether the defendant acted voluntarily and chose to commit the crimes charged, or either of them, from a desire for personal gain or from the fear of losing an opportunity to profit or whether his will power and better judgment were so overcome by Lamb that he was induced to commit the crimes charged without having had any previous intention to do so. To illustrate, if "A," a custodian of government property tell "B" that he will allow him to steal for a percentage of the profits from the sale thereof, then there would be no entrapment even though "A" told "B" that it was an excellent opportunity for making a lot of money. On the other hand, if "A" told "B" that he was in dire financial straits, that his family was on the verge of starvation and he was greatly in debt and begged him to steal goods from his custody and by such means induced "B" to steal for the accommodation of "A," which otherwise "B" would not even have contemplated, it would be entrapment."

6. The Court erred in refusing to give Defendant's Proposed Instruction No. 1.

7. The verdict is contrary to the weight of the evidence.

8. The verdict is not supported by substantial evidence.

9. The Court erred in denying the defendant's motion for a new trial.

10. Other manifest error appearing of record, to which objection was taken and exception reserved.

Dated at Ketchikan, Alaska, this 16th day of January, 1951.

CUDDY & KAY,

ZIEGLER, KING & ZIEGLER,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed January 16, 1951.

In the District Court for the Territory of Alaska,
Division Number One, at Ketchikan

No. 1549-KB

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH C. PATTERSON,

Defendant.

REPORTER'S TRANSCRIPT OF RECORD

Be It Remembered, that on the 19th day of October, 1950, at 10:00 o'clock a.m., at Ketchikan, Alaska, the above-entitled cause came on for trial before a jury, the Honorable George W. Folta, United States District Judge, presiding; the Government appearing by Stanley D. Baskin and

Ernest E. Bailey, Assistant United States Attorneys; the defendant appearing in person and by Wendell Kay, A. H. Ziegler and Robert H. Ziegler, his attorneys;

Thereupon, respective counsel having announced that they were ready to proceed, empanelling of a jury was commenced, and the jury as constituted, having been duly admonished by the Court before subsequent recesses, was duly sworn to try the cause on the 19th day of October, 1950, at 3:30 o'clock p.m.; respective counsel having stipulated that they would proceed with eleven jurors in case of the absence, illness or disability of one;

Whereupon, the jury was duly admonished and excused until the 23rd day of October, 1950, at 10:00 o'clock a.m., at which time the trial was resumed with all parties present as heretofore, with the exception of A. H. Ziegler, and the jury all present in the box;

Thereupon, a motion by Mr. Baskin, which was consented to by Mr. Kay, for the exclusion of witnesses was allowed by the Court with each party to look out after its own witnesses; Mr. Baskin made the opening statement to the jury in behalf of the Government; Mr. Kay made the opening statement to the jury in behalf of the defendant;

Whereupon, the trial proceeded as follows:

Government's Case

JOHN ROGER LAMB

called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination

By Mr. Baskin:

Q. What is your name? A. John Lamb.

Q. Where do you reside, John?

A. Ketchikan.

Q. How long have you lived here?

A. About six years.

Q. And by whom were you employed during the summer 1950?

A. The Fish and Wildlife Service. [2*]

Q. Is that the United States Department of Interior? A. That is right.

Q. Is that a division of the United States Government? A. Yes.

Q. Or department of the United States Government? A. It is.

Q. What day were you employed?

A. June 7th.

Q. 1950? A. That is right.

Q. And how long did you work for them, for the Fish and Wildlife Service?

A. Prior, or this year?

Q. This year.

A. From June 7th till August 22nd.

Q. 1950. A. That is right.

* **Page numbering appearing at foot of page of original Reporter's Transcript of Record.**

(Testimony of John Roger Lamb.)

Q. What was your title or your position with the Fish and Wildlife Service?

A. Deputy Enforcement Agent.

Mr. Kay: I am sorry, I can't hear you very well, Mr. Lamb.

A. Deputy Enforcement Agent.

Q. Speak a little louder.

The Court: I am wondering, in view of the opening [3] statements of the counsel, if they may not agree or stipulate to certain of these——

Mr. Kay: I will be glad to stipulate that Mr. Lamb is an official or employee of the United States Government serving in an official function during the period in question, and that he had been for two years prior thereto employed in the same or a similar capacity.

The Court: Is that satisfactory?

Mr. Baskin: Yes, your Honor.

The Court: The record will show that stipulation, and that will relieve you of the necessity of proving it.

Q. Mr. Lamb, as Deputy Enforcement Agent of the Fish and Wildlife Service, tell the jury what your duties were in connection with your employment.

A. Well, it was mainly to prevent illegal fishing in closed areas.

Q. And where were you directed to observe or prevent illegal fishing?

A. Anywhere within one mile of the heads.

Q. One mile of the heads of what?

(Testimony of John Roger Lamb.)

A. Boca de Quadra.

Q. You mentioned the heads. What are you speaking of? A. Mink Bay mainly.

Q. And well within one mile of Mink Bay, or one mile of the streams, of the mouth of the streams? [4]

A. Within one mile of the mouth of the streams, one statute mile.

Q. Of the streams that flow into Boca de Quadra? A. That is right.

Q. Well, were you in particular directed to prevent illegal fishing within one mile of the streams that flow into Mink Bay or Mink Arm of Boca de Quadra? A. Yes.

Mr. Baskin: If the Court please, I would like to ask the Court to take judicial notice of the area that was closed to commercial fishing in Boca de Quadra as reflected in the laws and regulations for the protection of commercial fisheries of Alaska, 1950, United States Department of Interior, Fish and Wildlife Service, as shown by Government publication, United States Printing Office, Washington, D. C.

The Court: What is the section number?

Mr. Baskin: It is section 124.9, entitled "Closed waters: all commercial fishing for salmon is prohibited as follows:" and then subsection f, "Boca de Quadra: indenting mainland; all waters within one statute mile of the mouth of any salmon stream tributary to Boca de Quadra."

(Testimony of John Roger Lamb.)

The Court: Judicial notice will be taken of the regulation quoted.

Mr. Baskin: Thank you. May it please the Court, I would like to have marked as Government's Exhibit for Identification, [5] to use as an exhibit, a drawing of the area of Boca de Quadra, Mink Arm, for the purpose of illustrating the area which was closed to commercial fishing.

The Court: You don't intend to introduce it as an exhibit with this witness?

Mr. Baskin: Yes, I do, your Honor.

The Court: Well, I don't think it is necessary to mark it for identification then.

Mr. Baskin: Well, I will introduce it as an exhibit by this witness, Exhibit No. 1.

The Court: Well, you mean you are offering it now, or you will offer it later?

Mr. Baskin: Well, I am offering it now.

Mr. Kay: It hasn't been identified yet.

Mr. Baskin: Very well.

The Court: Well, if it is a chart of the Coast and Geodetic Survey, it would be admissible without any further identification.

Mr. Baskin: That is right.

The Court: If you have any legends or writings on it, it will have to be authenticated before it is offered.

Mr. Bailey: Chart 8102.

The Court: Without any writing or legends?

Mr. Bailey: None other than what have been put on by the maker. [6]

(Testimony of John Roger Lamb.)

The Court: It may be admitted as Plaintiff's Exhibit No. 1.

Mr. Bailey: With the exception of the date which was stamped, I think the date of receipt.

Mr. Kay: No objection.

Mr. Baskin: We offer this chart, your Honor as Plaintiff's Exhibit No. 1 in Evidence.

The Court: It has already been admitted as Plaintiff's Exhibit No. 1.

Clerk of Court: The exhibit has been marked Plaintiff's Exhibit No. 1.

Mr. Bailey: We would like to have the Court's permission to put it on the blackboard. Have you any objection?

Mr. Kay: No objection whatever.

(Whereupon, the chart was placed on the blackboard.)

Q. Now, Mr. Lamb, are you familiar or do you know the area of Mink Arm or Mink Bay that was closed to commercial fishing? A. I do.

Q. Would you come down here a moment and mark on the map? I show you on Government's Exhibit No. 1, U. S. Coast and Geodetic Survey mount No. 8102, an area marked as Mink Bay.

Are you familiar with that area? A. Yes.

Q. Are you familiar with the location of what is known as Humpback Creek? [7]

A. I am.

Q. Will you mark on this map, this exhibit, near Mink Bay what would be approximately one mile

(Testimony of John Roger Lamb.)

from the mouth of Humpback Creek in Mink Bay? Will you take the red pencil and draw a line across the bay? And let's mark this "A." Now you may take your seat. Thank you. Does Humpback Creek flow into Mink Bay? A. It does.

Q. And was the area within one statute mile of the mouth of Humpback Creek closed to commercial fishing? A. Yes.

Q. Mr. Lamb, in connection with your duties as preventing persons fishing illegally in the closed area, were you to report to Fish and Wildlife agents or officers of the law regarding any violations?

A. I was.

Q. Were you to arrest anyone? A. Yes.

Q. That is, who were you to arrest?

A. Any person violating the fishing laws, such as fishing inside the areas; the closed areas, that is.

Q. You mean fishing inside areas closed to commercial fishing? A. That is right.

Q. And you were to report such acts to the agents of the Fish and Wildlife Service? [8]

A. That is right.

Q. Now, calling your attention to the date of July 18, 1950, did you have an occasion to see Joe Patterson on that date? A. On July 18?

Q. On or about July 18, 1950? A. Yes.

Q. Are you acquainted with Joseph C. Patterson? A. Yes.

Q. Do you also know him as Joe Patterson?

A. That is right.

(Testimony of John Roger Lamb.)

Q. Is this Joe Patterson sitting over here by his counsel? A. Yes.

Q. Mr. Kay? A. Yes.

Q. Where did you see Joseph Patterson on that occasion? A. Just off of Cygnet Island.

Q. Was this on July 18 that you saw him there?

A. I believe it was July 15th.

Q. I am speaking of—are you thinking of August 15 or July 15? A. Oh. July 15?

Q. July 18, 1950, that was before the season opened; where did you see the defendant? Did you have an occasion to be in Ketchikan, Alaska, on or about that date? [9] A. July 18?

Q. Or about that date; yes.

A. It seems to me I was in town on July 18th.

Q. Did you see Joe Patterson about that time?

A. Yes. I met him on the street.

Q. Here in Ketchikan? A. Yes.

Q. Did you have a conversation with him?

A. I did.

Q. What did you say to him, and what did he say to you?

A. As well as I remember, it was more or less just, "Hello," and he remarked, "I will be seeing you."

Q. Is that all that was said to you, or you said to him? A. As far as I remember; yes.

Q. Now, calling your attention to the date of about August 15, 1950, did you see Joseph Patterson about that date? A. I did.

(Testimony of John Roger Lamb.)

Q. Was that the day that the commercial fishing season opened in Southeastern Alaska?

A. Yes.

Q. And where were you at that time?

A. I was stationed in Boca de Quadra.

Q. And what were you doing there?

A. Acting as Fish and Wildlife agent.

Q. Were you patrolling the area to prevent illegal fishing in [10] the closed waters of that area?

A. That is right.

Q. And where did the defendant contact you?

A. Just off Cygnet Island.

Q. Were you living out there?

A. I was staying on my boat; yes.

Q. Who was staying with you?

A. My wife.

Q. And is Cygnet Island within the Boca de Quadra area? A. It is.

Q. How close to Mink Bay is Cygnet Island?

A. It sets in the entrance. It guards the entrance to Boca de Quadra.

The Court: When you say Boca de Quadra, do you mean the closed area?

Mr. Baskin: No. I mean the entire area.

Q. And Cygnet Island is at the entrance of Mink Bay, is it? A. That is right.

Q. And is Mink Bay an arm of what is generally known as Boca de Quadra? A. It is.

Q. Where was Joseph Patterson when you saw him?

(Testimony of John Roger Lamb.)

A. Oh, about five hundred yards off of Cygnet Island.

Q. What was he in or on?

A. He was on his boat. [11]

Q. What boat was that?

A. Rolling Wave.

Q. Did you see him aboard the vessel?

A. I did.

Q. Did you go aboard the vessel?

A. No, I didn't.

Q. What did you do?

A. I just hung alongside.

Q. What boat were you in?

A. In the speedboat; in my own speedboat.

Q. And you stayed alongside the Rolling Wave?

A. I did.

Q. And did you hold onto the rail or something like that? A. I did.

Q. Who else did you see aboard the vessel?

A. I just saw Mr. Patterson and some of his crew members.

Q. Do you know the names of the crew members?

A. No, I don't. The only one I know is by the name of Red; that is all.

Q. And you saw Joe Patterson aboard?

A. That is right.

Q. Did you have a conversation with him?

A. Yes, I did.

Q. Do you remember the approximate time that you saw him on the 15th? [12]

(Testimony of John Roger Lamb.)

A. It was about eleven o'clock.

Q. Eleven a.m.? A. Yes.

Q. In the morning? A. Yes.

Q. Now, tell the jury just what conversation you had with Joseph Patterson, what he said to you and what you said to him.

A. Well, as well as I remember why he asked about fishing up in the closed area, and I remarked, if I remember right, why I remarked, "What is the deal?" And he offered me a hundred dollars a thousand for fish that he would get out of the closed area.

Q. Did he mention what closed area that he wanted to fish in?

A. Well, I understood that it would be the head of Mink Arm.

Q. That area within a statute mile of Humpback Creek, the mouth of Humpback Creek?

A. Yes. Inside of that.

Q. Did he tell you when he would pay you?

A. Yes.

Q. That hundred dollars per thousand?

A. Yes.

Q. When did he tell you he would pay you?

A. It would be on the following evening.

Q. You mean after he had fished? [13]

A. That is right.

Q. Did you tell him about anybody else patrolling the area in there? A. I did.

Q. What did you say to him?

(Testimony of John Roger Lamb.)

A. I told him there were two other fellows working in the area with me.

Q. You mean two other other agents of the Fish and Wildlife Service? A. That is right.

Q. And they were working with you?

A. That is right.

Q. What else did you say to him about these two agents with regard to the money he was to pay you?

A. Whatever I got would have to go with them or be split with them.

Q. You would have to split with these two agents? A. That is right.

Q. Any money that you received from him; is that correct? A. That is right.

Q. Did Patterson ask you at that time if he could fish in that area that night?

Mr. Kay: Object to the question as leading, your Honor. Let him ask who asked who.

The Court: It is leading; that is true. You might ask him what the defendant said, if anything. [14]

Mr. Baskin: Very well, your Honor.

Q. What did Patterson say to you at that time about fishing that night?

A. I don't recall that he said anything outside of, "I will see you later this evening."

Q. Very well. Did you see him again that day?

A. I did.

Q. Where did you see him?

(Testimony of John Roger Lamb.)

A. At about the same distance off of Cygnet Island.

Q. What time of the day was it if you remember?

A. It was shortly before nightfall. In fact it was heavy dusk.

Q. Was anyone with you? A. Yes.

Q. Who was with you?

A. Richard Warner.

Q. Who is he?

A. He is a Fish and Wildlife agent.

Q. And you saw him about five hundred yards off Cygnet Island? A. Roughly; yes.

Q. Where was Patterson?

A. He was on board his boat.

Q. That is the Rolling Wave?

A. That is right.

Q. Did you see anybody else aboard the Rolling Wave? [15]

A. No; other than the crew members that I mentioned before.

Q. Did you have a conversation with Joe Patterson?

A. Yes. I believe I introduced this Warner to him.

Mr. Kay: Pardon me, your Honor. I am informed some of the Government witnesses are in the library. It would seem the tone of voice would be sufficient to violate Mr. Baskin's invocation of the rule. If they are to be excluded from the court-

(Testimony of John Roger Lamb.)

room, obviously the purpose is to exclude them from listening to the testimony.

Mr. Baskin: Well, we will tell them to go down in our office if there is anybody in there. Your Honor, I had no knowledge of that.

The Court: That is just one of the difficulties to which the Court referred at the time the motion was made, that we have very limited facilities here. Do you wish to continue your examination?

Mr. Baskin: Yes, your Honor, I do.

Q. You stated, I believe, that you had some conversation with Joe Patterson? A. I did.

Q. And who was present at the time you conversed with him? A. Richard Warner.

Q. And was Joe Patterson there?

A. He was.

Q. Will you tell the jury what Patterson stated to you, and [16] what you stated to him?

A. Well, I don't remember all the details right down to the bottom, but it seems to me that I introduced this Richard Warner to Mr. Patterson and, if I recall correctly, he asked if he was one of the boys, and I mentioned that he was.

Q. One of the agents of the Fish and Wildlife Service?

A. Yes, that is right; or one with me, I imagine.

Q. What else did you say, or he say?

A. He also asked about fishing that evening and how it would be to fish that evening.

Q. What did you tell him?

A. I told him no because, due to the fact that

(Testimony of John Roger Lamb.)

it was the opening day, why there were too many boats around.

Q. At the time you were talking with him did you say anything to him or did he say anything to you about splitting any money you received for permitting him to fish illegally?

A. Yes, that is right.

Q. What did he say, and what did you say?

A. Well, he said that would be more or less up to me, that it was to be divided among the three of us.

Q. At the time did you outline or did he outline any kind of signal arrangements that you could protect him on fishing in that area?

A. No. I outlined a signal setup. [17]

The Court: If you wish to retain your witnesses nearby and in the library, I think the order would be complied with if the door were kept shut.

Mr. Bailey: I don't think it is necessary. They are out there (indicating the lobby) with the rest of the witnesses. Close the door please, Mr. Bailiff.

The Court: Well, there is no necessity of doing it unless the witnesses are there.

Mr. Bailey: Well, of course, I can't run out every two minutes and watch them.

The Court: Well, you can instruct them of course.

Mr. Bailey: Yes; I did, your Honor. We didn't know they were there originally.

Q. Mr. Lamb on or about the 16th of August,

(Testimony of John Roger Lamb.)

1950, did you see the Rolling Wave or the defendant? A. I did.

Q. Where did you see them?

A. Just off of Cygnet Island.

Q. Did you see the vessel Rolling Wave?

A. I did.

Q. And was Joseph Patterson aboard?

A. Yes, sir.

Q. Did you have a conversation with him?

A. Yes.

Q. What did he say, and what did you say? [18]

A. He asked, "How about this evening?" And I said the coast was all clear. That is all there was.

Q. Did he answer you? A. "O.K."

Q. What did he do, or what did the vessel do?

A. Proceeded on up Mink Arm.

Q. Did they fish any that evening?

A. I believe so; yes.

Q. Where did they fish?

A. Just inside the markers.

Q. You mean within one statute mile of Humpback Creek? A. That is right.

Q. Did you see them fish? A. Yes.

Q. What did they do in fishing?

A. Well, as near as I remember they had their net out. That is about all I remember. They just had their net out. I came down close to them and turned around and went back.

Q. Did you go near the area where they were fishing?

(Testimony of John Roger Lamb.)

A. Yes. I come within probably fifty feet or seventy-five feet of the boat.

Q. Of the Rolling Wave? A. Yes.

Q. And you saw them fishing?

A. That is right. [19]

Q. And that was within the closed area?

A. That is right.

Q. What did you do after you saw them fishing?

A. Just hesitated there for a moment and went on back down to my boat.

Q. You returned back to the boat on which you were living? A. That is right.

Q. Near Cygnet Island?

A. That is right.

Q. Now, calling your attention to about August 18, 1950, did you see Joe Patterson?

A. I did; yes.

Q. Where did you see him on that day?

A. Just off of Cygnet Island.

Q. Did you have a conversation with him?

A. I believe I did.

Q. What did you say to him, and what did he say to you?

A. If I recall correctly, he asked how it was "to fish up in there this evening," referring to that night.

Q. What did you say?

A. I said, "Everything is all clear."

Q. Did he reply?

A. Yes, I believe he did. I believe he said "O.K." or something to that effect, and went on up.

(Testimony of John Roger Lamb.)

Q. Where did he go after you had that conversation with him? [20] A. On up Mink Arm.

Q. Now, at the time you talked with him what was he on or what was he in?

A. Well, he was on the same boat, the Rolling Wave.

Q. The Rolling Wave? A. That is right.

Q. And did you see them go on up into Mink Arm?

A. Yes. I seen them leave and go on up.

Q. Where did they go to up into Mink Arm or Mink Bay? A. Up near Humpback.

Q. Up near Humpback Creek?

A. That is right.

Q. Did you have an occasion to go up there while they were near Humpback Creek?

A. I did.

Q. Did you see them fishing? A. I did.

Q. Where were they fishing?

A. Just inside the markers there.

Q. You mean just inside the closed area?

A. That is right.

The Court: Well, is this another closed area?

Mr. Baskin: No. This is the same.

Q. That is the closed area or within one mile of Humpback Creek that flows into Mink Bay; is that correct? [21] A. That is right.

Q. How did you get up there?

A. I went up in my speedboat.

Q. And was the defendant Joseph Patterson aboard? A. He was.

(Testimony of John Roger Lamb.)

Q. And what did you see the defendant or any of his crew on the Rolling Wave doing?

A. They were in a set.

Q. What did you see?

A. They were in a set.

Q. What do you mean by "in a set"?

A. That means when your net is in the water fishing.

Q. How close to the mouth of Humpback Creek were they fishing?

A. Well, that would be pretty hard to tell because it is dark up there, very dark, but they were well inside the area.

Q. Did you go alongside their boat?

A. I did.

Q. Can you tell the jury whether their net was tangled or not?

A. Yes; it was considerably tangled.

Q. What was the matter with the net? What do you mean when you say it was tangled?

A. Well, it seemed as though there was sticks and various debris off of the bottom in the web, silt and stuff in the [22] net.

Q. Did you say anything when you approached the vessel?

A. No. All I remember of saying was, "How did you get into such a mess," or something like that.

Q. How long did you stay up there or near the Rolling Wave?

A. Approximately forty minutes.

Q. What did you do while you were there?

(Testimony of John Roger Lamb.)

A. Helped untangle the web and stuff.

Q. And you spent about forty minutes there with them?

A. I would say that was about it.

Q. What did you do then?

A. I returned to my boat.

Q. At the time you were up there did you have a conversation with Joseph Patterson—Joseph C. Patterson?

A. I don't remember any specific conversation although I may have talked to him, which I undoubtedly did.

Q. He was aboard the vessel there at the time you were up there, was he not?

A. That is right.

Q. And you stayed about forty minutes?

A. Yes, I should say forty minutes.

Q. What did you do after you stayed there forty minutes?

Mr. Kay: I object. It is repetitious. He said he untangled the net.

Mr. Baskin: No. I said what did he do—— [23]

The Court: Objection overruled.

Q. What did you do after you had stayed there for about forty minutes?

A. As well as I remember, I got into my speedboat and came back to my vessel.

Q. Your vessel?

A. No. It seems to me I went to the Chris-Craft first, the Fish and Wildlife Chris-Craft.

(Testimony of John Roger Lamb.)

Q. Well, but while you were at the Rolling Wave did you stay there or what did you do?

A. You mean during the ensuing forty minutes?

Q. Yes. Did you go aboard?

A. Yes, I did.

Q. And then after you had been there forty minutes, what did you do? Did you leave or what did you do? A. Yes; I left.

Q. How did you leave?

A. In my speedboat.

Q. Do you know when or if the Rolling Wave left that day or night? A. No, I can't say.

Q. Did you return to Cygnet Island?

A. I did.

Q. Now, calling your attention to on or about the 19th of August, 1950, did you see the defendant Joseph C. Patterson? [24]

A. On the 19th?

Q. Yes. A. Yes.

Q. Where did you see him?

A. Approximately the same place, just off of Cygnet Island.

Q. And that is near the mouth or entrance to Mink Arm of Boca de Quadra?

A. Yes. It guards the main entrance.

Q. Do you remember the time that you saw him?

A. I would say it was along about nightfall.

Q. And where was Patterson when you saw him? A. He was on board his boat.

(Testimony of John Roger Lamb.)

Q. Is that the Rolling Wave?

A. That is right.

Q. How did you get to the Rolling Wave?

A. With my speedboat.

Q. And did you go aboard the Rolling Wave?

A. I did.

Q. Did you see Joe Patterson while aboard?

A. I did.

Q. Did you have a conversation with him?

A. I did.

Q. Now, tell the jury just what he said to you and what you said to him, and what he did, if anything, there.

A. Well, as well as I remember the first part of the conversation [25] why he asked how it was "for fishing this evening."

Q. Well, did you have any other conversation with him?

The Court: Well, did you answer that question of his? I mean the defendant's question and not the District Attorney's?

A. I believe I did.

The Court: What did you say?

A. I believe I told him that it was all right.

Q. You mean it was all right to fish that evening? A. That is right.

Q. Did you have any other conversation with him?

A. Yes. Just shortly before he departed why he mentioned the fact that he had some money for me.

Q. Well, what did he say in that regard?

(Testimony of John Roger Lamb.)

A. Well, he mentioned that that was the money for the fish that he got the evening before.

Q. Tell the jury whether or not he gave you any money? A. May I ask a question?

Q. Just tell the jury whether or not he gave you any money at that time?

A. Is this August 19?

Q. Yes; this is August 19.

A. Yes. The answer is yes.

Q. And how much—where were you and where was he when he gave you the money? [26]

A. As well as I remember, I was in his cabin.

Q. That is aboard the Rolling Wave?

A. That is right.

Q. And what did he give you?

A. He gave me some money.

Q. How much money?

A. I believe it was one hundred and eighty dollars.

Q. Was that currency of the United States Government? A. Yes.

Q. Or money used as a medium of exchange in the United States and its possessions?

A. Yes.

Q. Was it in bills, silver or what?

A. Bills.

Q. Do you know what bills he gave you, what denominations?

A. I believe they were twenties.

Q. Do you know whether he gave you any fifties or not? A. No, I don't.

(Testimony of John Roger Lamb.)

Q. You don't remember that?

A. No, I don't.

Q. What did you do with the money?

A. I put it in my watch pocket.

Q. But you do know that he gave you one hundred and eighty dollars; is that correct?

A. Yes. [27]

Q. Then after receiving the money what did you do?

A. I proceeded from his boat to the Chris-Craft.

Q. You spoke of the Chris-Craft. What vessel is that?

A. That is a Fish and Wildlife vessel that they had down in that area, an extra craft besides me.

Q. Who was the captain or skipper of that vessel?

A. I believe his name is Richard Warner.

Q. Was there any other person aboard that vessel? A. Yes.

Q. What is his name?

A. Gene Cottrill.

Q. They were both agents of the Fish and Wildlife Service? A. That is right.

Q. How long after leaving the Rolling Wave was it that you went aboard the Chris-Craft?

A. Just a matter of minutes.

Q. Can you tell the jury about what distance in miles, if you know, the Chris-Craft was from the Rolling Wave?

A. Oh, roughly it might be something over a half a mile.

(Testimony of John Roger Lamb.)

Q. And you went directly from the Rolling Wave to the Chris-Craft? A. I did.

Q. And were both of those vessels at the time within the Boca de Quadra area?

A. Would you repeat that please? [28]

Q. Were both the vessels, Rolling Wave and the Chris-Craft, within the Boca de Quadra area?

A. Yes.

Q. And how near Cygnet Island, or what other point around there that is well known, were they?

A. Oh, approximately anywhere between five and eight hundred yards.

Q. From Cygnet Island?

A. That is right.

Q. At this point I want to ask you if the Boca de Quadra, the area known as Boca de Quadra, is within the Territory of Alaska? A. Yes.

Q. After going aboard the Chris-Craft who did you see aboard?

A. Richard Warner and Gene Cottrill.

Q. What did you do?

A. I laid the money on the table.

Q. On what table?

A. On the table of the Chris-Craft in its galley.

Q. How much money did you lay on the table?

A. One hundred and eighty dollars as well as I remember.

Q. Was that the same money that the defendant Joseph C. Patterson gave you a few minutes before? A. That is right.

(Testimony of John Roger Lamb.)

Q. What did you say to Richard Warner? [29]

A. I told him to divide it up evenly amongst us.

Q. What did he say or do?

A. He did just that if I recall.

Q. How did he divide it?

A. He divided it three ways, equal shares.

Q. How much did you receive?

A. Sixty.

Q. You mean sixty dollars?

A. That is right.

Q. How much did you leave there?

A. One hundred and twenty.

Q. What did Richard Warner do with the one hundred and twenty?

A. Well, that I don't know. They pocketed it, I imagine.

Q. After you received your sixty dollars what did you do? A. I returned to my boat.

Q. The boat you were living on?

A. That is right.

Q. And was that near Cygnet Island?

A. Yes.

Q. Now, at the time when you returned to Cygnet Island, your boat that you were living on, did you show the sixty dollars to your wife?

A. I believe I did.

Q. Did you tell her—what did you tell her?

A. I believe I told her that I had received that from the [30] Rolling Wave.

Q. Well, did you tell her you received it from Joseph C. Patterson?

(Testimony of John Roger Lamb.)

A. Yes. I don't know as I went into that much detail as to mention the man. I might have said Joe Patterson. I am not sure.

Q. Did you say anything to her as to whether or not you had split any money with the two other agents of the Fish and Wildlife?

A. I did; yes.

Q. Did you tell her that you had split the one hundred and eighty dollars with them?

A. That is right.

Q. Did you show her the money, the sixty dollars, that you received from Joe Patterson?

A. It seems to me that I did; yes.

Q. Now, calling your attention to the date of, on or about the date of August 21, 1950, did you see the defendant Joe Patterson on that day?

A. I did.

Q. Where did you see him?

A. Just off of Cygnet Island.

Q. Is that near the mouth of Mink Bay or Mink Arm? A. Yes.

Q. What was he in or on at the time you saw him? [31] A. On his boat.

Q. What boat was that?

A. Rolling Wave.

Q. How did you get to the Rolling Wave?

A. With my speedboat.

Q. Did you go aboard the Rolling Wave?

A. I did; yes.

Q. Did you have a conversation with Joseph Patterson? A. Yes.

(Testimony of John Roger Lamb.)

Q. What did he say to you, and what did you say to him?

A. If I recall correctly, he asked how it would be to fish that evening.

Q. What did you say?

A. I said no, it wouldn't be a good idea because the Number 11 was in there, namely a Fish and Wildlife boat.

Q. "Number 11," you mean that is a Fish and Wildlife vessel? A. That is right.

Q. That is a boat, isn't it?

A. That is right.

Q. And you told him that that vessel was in that area at that time? A. That is right.

Q. And did you have any other conversation at that time? A. I did.

Q. What did he say to you, and what did you say to him? [32]

A. I received one hundred dollars from him.

Q. Did he say anything to you when he gave you a hundred dollars?

A. Not that I recall of outside of, other than that was my cut, or something like that.

Q. What did he give you?

A. He give me a hundred dollars.

Q. Was that in currency of the United States?

A. It was.

The Court: I think you ought to be more specific. Currency includes anything, even coin.

Mr. Baskin: I will, your Honor. Thank you.

Q. Well, was that money of the United States?

(Testimony of John Roger Lamb.)

A. That is right.

Q. What was it? Dollars?

A. It was in bills; yes.

Q. Do you remember what they were, whether it was paper money or silver?

A. It was paper.

Q. And how much was it?

A. One hundred.

Q. Did he say anything else to you when he gave you that hundred dollars?

A. No, outside of, as well as I remember, that he asked how it was to fish that evening. [33]

Q. Did he tell you whether or not that was money for fish he had caught the previous evening?

A. Yes.

Q. Did he tell you that it was for fish he had caught the previous evening?

A. That is right.

Q. Now, upon receipt of that money what did you do?

A. I left and went on further patrol.

Q. What did you do with the hundred dollars that you received from Joe Patterson?

A. I put it in my pocket.

Q. Did you keep that one hundred dollars?

A. I did.

Mr. Kay: I didn't hear that answer.

A. I did.

Q. Did you divide any of it with any other agents? A. No, I didn't.

(Testimony of John Roger Lamb.)

Q. Why didn't you divide it?

A. Well, at the time, as I said before, Number 11 was in there, and of course I had two other agents in the territory, so consequently I didn't want to tip my hand or the other boys' either.

Q. Now, Mr. Lamb, on or about July 2nd or 4th, 1950, where were you?

A. In Boca de Quadra. [34]

Q. Who was with you? A. My wife.

Q. Were you living on your boat out there?

A. That is right.

Q. And how much money did you have—about how much did you have at the time you were out there?

A. Oh, approximately five dollars.

Q. Did you have an occasion to receive a hunting, fishing and trapping license about that date?

A. I did.

Q. Did you pay for it at the time?

A. No, I didn't.

Q. Who gave you that license?

A. Nancy Moxstead.

Q. Who is Nancy Moxstead?

A. She is a secretary for the Fish and Wildlife here in Ketchikan.

Q. Does she issue licenses for hunting and fishing? A. Yes.

Q. For the Fish and Wildlife Service?

A. Yes.

Q. Why didn't you pay her for the license?

(Testimony of John Roger Lamb.)

A. Because I didn't have any money on me at the time. I was on my boat.

Q. Did you have any other money on the boat, any other money [35] other than the five dollars that you had out there?

A. Not to my knowledge.

Q. Now, during the month of July and August did you receive any money? A. I did.

Q. How much did you receive during July?

A. In July I received one Territorial check.

Q. How much was that?

A. If my memory serves me right, it was three hundred and twelve dollars.

Q. And did you received any other check?

A. In the month of July?

Q. Well, in the month of August?

A. Yes.

Q. About how much was that?

A. That, I believe, was three hundred and ninety-two dollars.

Q. Now, is that all the salary money or money you received as salary or compensation while you were working out there for the United States Fish and Wildlife Service during June to about August 22, 1950? A. That is right.

Q. Now, out of your first check of three hundred and twelve dollars tell the jury about how much money you spent out of that. Did you have an occasion to spend any of it?

A. Out of the first check? [36]

(Testimony of John Roger Lamb.)

Q. Yes.

A. Let's see. I called up and flew into town with that first check.

Q. Well, who did you pay any money to for the service of flying you into town?

A. The Webber Air Service.

Q. Do you know how much that fare was?

A. I believe it was forty-six dollars.

Q. Did you have an occasion to pay a bill?

A. I did. I paid a Standard Oil bill.

Q. Do you know about how much that was?

A. Thirty dollars.

Q. Did you purchase any groceries?

A. Yes, I did.

Q. About how much did you spend for groceries? A. Ten dollars.

Q. Then when you got back to Boca de Quadra about how much money did you have on your possession?

A. Well, offhand I don't remember just for sure how much I did have when I got back.

Q. Well, would it have been approximately two hundred and twenty-six dollars?

A. I would say that that would be a very near figure.

Q. Now, out of your check that you received during August—do you know about what time you received that check? [37]

A. Shortly after the first of August.

Q. Incidentally—strike the statement please. And how much was that check that you received

(Testimony of John Roger Lamb.)

about the first of August or near the first week in August? A. Three hundred ninety-two.

Q. And did you get money for that? Was that check cashed?

A. Yes; it was cashed shortly afterwards.

Q. Did you have an occasion to spend any of that money? A. I did.

Q. Tell the jury what bills, if any, you paid out of that?

A. I paid Harry Kates eighty-five dollars out of that money.

Q. Did you buy anything else?

A. I bought some outboard parts.

Q. Do you know about how much that cost?

A. Around six dollars.

Q. Who bought those for you?

A. I believe John Wendler.

Q. Is he with the Fish and Wildlife Service?

A. Yes.

Q. And who cashed that check for you?

A. Wendler himself.

Q. Was he the one that paid Kates, or did he give a money order for that, or do you remember?

A. I don't just know for sure.

Q. But anyway out of that money you know you paid Kates [38] eighty-five dollars?

A. That is right.

Q. Did you buy any groceries?

A. Well, off and on; yes.

Q. Where did you buy those groceries?

A. From various boats in the area.

(Testimony of John Roger Lamb.)

Q. That you would see there near or in the Boca de Quadra area? A. That is right.

Q. And about how much did you spend for groceries?

A. Oh, it was around forty dollars.

Q. Now, Mr. Lamb, on or about the 22nd day of August, 1950, do you know about how much money you had on your person?

A. If I recall——

Q. Or had in your possession out there, rather?

A. If I recall correctly, I had something over seven hundred dollars.

Q. Well, did you have about six hundred and seventy?

A. Yes, I believe that is an accurate figure.

Q. Now, Mr. Lamb, did you have an occasion to pay also out of your second check the fee for a fishing license for yourself or your wife?

A. I did.

Q. About how much was that?

A. It was about three dollars, I believe. [39]

Q. And now, this six hundred and seventy dollars that you had, did that include the money which you had received from Joe Patterson?

A. Yes.

Q. And did it include also the money you received from your salary checks that wasn't spent?

A. That is right.

Q. And did it include the sixty dollars that you received from Joseph Patterson on or about the 19th of August, 1950? A. Yes.

(Testimony of John Roger Lamb.)

Q. And the one hundred dollars that you received about the 21st of August, 1950?

A. That is right.

Q. Now, the area you mentioned as Mink Bay, as part of the Boca de Quadra, that is also within the Territory of Alaska, isn't it?

A. That is right.

Q. And you received this money on these two occasions from Joe Patterson there within that vicinity; is that correct? A. Yes.

Mr. Baskin: You may cross-examine the witness.

Cross-Examination

By Mr. Kay:

Q. Mr. Lamb, this Boca de Quadra area is a rather large one, [40] isn't it?

A. That is right.

Q. It includes this whole area here? All this water? A. Yes.

Q. Could you come down and show us what is the area known as the Boca de Quadra?

A. (Indicating.)

Q. In other words this is the entrance to the Boca de Quadra; is that right? A. Yes.

Q. Out here at what is called White Reef and Slate Island? A. That is right.

Q. And then Mink Bay is this smaller projection coming down here toward the bottom?

A. That is right.

Q. Now, a considerable portion of the Boca de

(Testimony of John Roger Lamb.)

Quadra is open water, is it not? A. Yes.

Q. Fishing is perfectly legal there?

A. Yes.

Q. Now, the area which is closed to fishing—you correct me if I am wrong, Mr. Lamb—is this small triangular area that you have marked with a pencil there?

A. I didn't mark there; I marked here.

Q. Well, do you see the pencil mark there? I don't know who [41] made them. I thought that you had. Now, that is a triangular area. This small triangular area, marked with pencil, is closed water, is it not? A. That is right.

Q. And then each of the arms, each of the—where there is a creek that flows into one of these arms, also the area at the end of the arm, one statute mile from the mouth of the creek, is closed, so that all the rest of the water is open water; is that right? All of this water in here, and all of this water in here, and the water down Mink Arm down to the one statute mile, that is all open water; is that right?

A. That is right. The water between these two areas here, that is a closed area, and this is a closed area here, but this area right in here is open.

Q. Yes. Anyone can fish in there, perfectly legal during the open season?

A. That is right.

Q. Now, about how far would you say it was—is Cygnet Island right here at the mouth of Mink

(Testimony of John Roger Lamb.)

Arm, about where my finger is? A. Yes.

Q. And the area then from about Cygnet Island down to within one statute mile of the creek where you have drawn the red line is open water? [42]

A. Well, no. Cygnet Island, according to the way this is drawn now, is incorrect.

Q. I see. It should be a little farther down to the bottom of the map, to the bottom of the triangle there? A. That is right.

Q. Then the area between where that line would be, somewhat south of Cygnet Island, on down to the markers is open water?

A. Correct.

Q. Any boat can go in there and fish during the open season? A. That is right.

Q. About how far would you say it was from the base of the triangle here at the head of Mink Arm down to the markers?

A. From the head of the triangle?

Q. Well, no. From the base?

A. Well, it is approximately three miles, I would say.

Q. Mink Arm then is probably something like three and a half miles long or four miles long?

A. Well, it is slightly more than that. It would be about four miles because the marker is about a mile above the creek.

Q. You can take the stand. How well do you know Bill Tatsuda? A. Who?

Q. Bill Tatsuda? A. Not too well. [43]

(Testimony of John Roger Lamb.)

Q. You usually buy your groceries from him when you are in town, don't you?

A. That is right.

Q. You have known Bill for a long time, haven't you? A. Yes.

Q. And did you ever talk to Bill or have occasion to talk to Bill about fishing?

A. I don't know as I have.

Mr. Baskin: Your Honor, I object to that. It is immaterial to the issues in this case.

Mr. Kay: It is just preliminary of course.

Mr. Baskin: It is cross-examination. That might be part of his case, but this is on cross-examination now.

The Court: I don't know of course what counsel seeks to elicit. If you are on the subject of entrapment, I am inclined to think that you should question him first about his dealings with the defendant. In other words, before you can introduce evidence or question him about some other offers that he made, such as you intimated you would disclose in your opening statement, you ought to question him about the immediate transaction.

Mr. Kay: I planned to do it the other way, but it makes no difference.

Q. Do you recall an occasion in June, approximately in June, according to your remark either just before or just after [44] you received word that you were to be stream watchman out there at Boca de Quadra, upon which you had a conversation with Joe Patterson, the defendant here, and

(Testimony of John Roger Lamb.)

Bill Tatsuda in the rear of Bill Tatsuda's grocery store? A. I don't recall that.

Q. Is it possible that you had such a conversation and don't recall it?

A. I don't know as it is.

Q. Well, now, isn't it a fact, Mr. Lamb, that on that occasion, sometime either shortly before or shortly after you received your appointment as stream watchman, you were talking to Bill Tatsuda in the back of the grocery store when Joe Patterson came in, and Joe Patterson then came into the back of the store?

Mr. Baskin: I object to that, your Honor. He hasn't connected that up with the defendant yet.

Mr. Kay: I just got through saying Joe Patterson came in there, came into the back of the store.

Mr. Bailey: The witness testified he did not remember any conversation, your Honor.

The Court: Well, but counsel is not foreclosed by his failure of memory. He can call it to his attention.

Mr. Kay: I can lay the foundation for impeachment.

Mr. Bailey: I understand that.

The Court: You may proceed. [45]

Q. Isn't it a fact, sir, that there was such an occasion, and Joe Patterson came into the back of the store, and you then had a conversation with him? A. I don't remember as I did.

Q. It is a fact that such a conversation occurred,

(Testimony of John Roger Lamb.)

is it not, Mr. Lamb? A. I don't remember it.

Q. And that on that occasion, isn't it a further fact that on that occasion you asked Mr. Patterson if he wouldn't come out to the Boca de Quadra this summer and fish?

Mr. Bailey: I object, your Honor, for this reason, that he said he didn't have any. He has answered it three times.

The Court: But, as I said a moment ago, counsel is not foreclosed by his failure to remember or even his denial.

Mr. Kay: I am trying to refresh his obviously weak recollection here, Mr. Bailey.

The Court: Objection overruled.

Q. Didn't you have such a conversation with Mr. Patterson, now, in which you invited him to come out to the Boca de Quadra and fish this summer, Mr. Lamb? You recall that, don't you?

A. I can't say that I do.

Q. And isn't it further a fact that during that conversation, Mr. Lamb, you told Mr. Patterson the large amount of money [46] that you had made during the previous season by selling fish to other persons out of the Boca de Quadra? You were stream watchman out there last year, were you not?

A. That is right.

Q. And isn't it a fact that you told Joe Patterson on that occasion that you made enough money out there selling fish the season before to buy a troller? A. I don't recall that.

Q. Well, you did buy a troller?

(Testimony of John Roger Lamb.)

A. Yes; but it isn't paid for.

Q. And did you also tell Joe Patterson that you made enough money to buy a house, a seven-thousand-dollar house, in Seattle?

A. I can't say that I did.

Q. All this being in the presence of Bill Tatsuda? A. (No response.)

Q. You recall that, don't you?

A. I can't say that I do.

Q. Well, isn't it a fact that you talked to Bill Tatsuda along this line on several occasions during the winter?

Mr. Baskin: Your Honor, I object to that. Anything that wasn't said in the presence of the defendant would be immaterial.

Mr. Kay: That is my objection.

Mr. Baskin: It is mine, too. [47]

Mr. Kay: I am satisfying the Court's request. The Court requested me to tie the defendant in first. Now I would like to go back and bring in the fact that this same solicitation had been made to Bill Tatsuda, a friend and business partner, half-owner of the boat, the Rolling Wave.

Mr. Baskin: It still doesn't make any difference. It is not material as to what he said to Bill Tatsuda or anybody else. It is not in the presence of the defendant.

Mr. Kay: It is relevant on about half a dozen grounds, your Honor, including——

The Court: I am inclined to think that it is admisssible because of the defense announced of en-

(Testimony of John Roger Lamb.)

trapment. Any offer of this kind, when it is denied, made to someone else, particularly one closely associated with the defendant, would be admissible, so on your statement, however, that you will connect it up with such a defense the objection will be overruled, but of course it will be wholly irrelevant unless you would put in some evidence in support of such a defense.

Mr. Kay: Oh, yes. Mr. Tatsuda and Mr. Patterson and a number of other people will testify.

The Court: Well, with that understanding the objection is overruled.

Mr. Baskin: And if he doesn't then this part of the testimony will be stricken from the record and the jury instructed not to consider it? [48]

The Court: Yes. Not only that, but counsel would certainly be in contempt of Court, I think.

Mr. Kay: Considering the risk, I will pursue the cross-examination, your Honor.

The Court: Well, I don't mean you have to succeed, but you have to produce some evidence of it so that it would not appear that you merely put this in for ballast here.

Mr. Kay: Of course not. I think I can convince the jury beyond any doubt on that question.

Q. Well, now, you were in Tatsuda's grocery store on a number of occasions during the winter, were you not, Mr. Lamb?

A. I usually purchase my groceries there; yes.

Q. And isn't it a fact that you, as far back as

(Testimony of John Roger Lamb.)

November or December of 1949, after the fall fishing season, told Bill Tatsuda on one occasion in his grocery store, discussed with him the amount of money made selling fish at Boca de Quadra during that season and talked over with him the prospects of the Rolling Wave, which he and Joe Patterson had just purchased——

Mr. Baskin: I think, your Honor, he should fix the time.

Mr. Kay: I did. November or December.

The Court: It all depends upon whether counsel is merely cross-examining him or wants to lay the foundation for impeachment. If he doesn't lay the foundation for impeachment, [49] he will be shut out of impeachment and limited to whatever he can develop on cross-examination.

Mr. Kay: I don't understand that ruling, your Honor.

The Court: You know of course that in order to lay a foundation for impeachment you have to put the question to the witness in impeaching form with the details as to the persons present and the time and place and circumstances.

Mr. Kay: Yes, sir.

The Court: Now, you don't have to do that, and if you don't——

Mr. Kay: It all depends on the answer he gives.

The Court: It depends on whether you merely want to cross-examine or you want to impeach him, so you do it either way you see fit. The Court isn't going to stop you.

(Testimony of John Roger Lamb.)

Mr. Kay: Well, until he replies to this question I don't know what my next question will be. If he denies the conversation, then I will put the impeaching question—did you tell him on or about such and such a time, so and so.

The Court: Yes.

Q. Do you recall the question, Mr. Lamb?

A. Will you repeat it, please?

Mr. Kay: Would the court reporter please find and read the question if possible?

Court Reporter: Q. "And isn't it a fact that you, as far back as November or December of 1949, after the fall [50] fishing season, told Bill Tatsuda on one occasion in his grocery store, discussed with him the amount of money made selling fish at Boca de Quadra during that season and talked over with him the prospects of the Rolling Wave, which he and Joe Patterson had just purchased——"

A. No, I don't recall that conversation at the time.

The Court: I think we will take a recess.

Q. The last response was, "at the time"?

A. That is right. At the time I don't remember.

Whereupon Court recessed until 2:00 o'clock p.m., October 23, 1950, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; the witness John Roger Lamb resumed the witness stand, and the cross-examination by Mr. Kay was continued as follows:

The Court: You may proceed.

Q. Mr. Lamb, I believe you testified on direct examination, did you not, that sometime in July

(Testimony of John Roger Lamb.)

you returned to Ketchikan from your post at Boca de Quadra? A. That is right.

Q. You recall about what day in July that was, sir?

A. Off hand, no, but it was in the early part of July.

Q. Would it have been about July 6th, 7th, or somewhere along in there, or later than that; can you recall?

A. I believe it was later than that.

Q. About July 18th? [51]

A. No. It would probably be about the 10th of July.

Q. Do you recall whether or not you returned to Ketchikan more than once during that month?

A. Yes. I came in twice.

Q. And the remainder of the month—how long were you in town on those two occasions; do you recall?

A. I didn't remain in town more than twenty-four hours at either time.

Q. The remainder of the month you spent out there at your station at Boca de Quadra?

A. That is right.

Q. Well, now, I believe you said also, did you not, on cross-examination that you paid Webber Air Service forty-six dollars, fare for your first trip in? A. That is right.

Q. How did you come in the second time?

A. I came in by boat.

Q. Now, on this occasion when you paid Webber

(Testimony of John Roger Lamb.)

Air Service forty-six dollars, was that also the occasion when you paid your Standard Oil bill of thirty dollars? A. That is right.

Q. And bought about ten dollars worth of groceries? A. That is right.

Q. Did you buy those down at Tatsuda's store?

A. No, I didn't. [52]

Q. Did you visit Tatsuda's store on that occasion? A. I don't recall that I did.

Q. It is possible that you did and don't recall it?

A. No, I don't believe I did.

Q. On the second occasion when you were in Ketchikan did you on that occasion visit Tatsuda's store?

A. Yes. We bought some groceries there. My wife did anyway.

Q. Your wife did? A. Yes.

Q. Would that have been on about July 18th? About how long was it after your first trip?

A. Just shortly after my first trip.

Q. Well, you testified on direct examination, did you not, that on July 18th you met Joe Patterson on the street in Ketchikan? A. Yes.

Q. And would it have been on that same occasion, on about July 18th, the same day, the same twenty-four-hour period, that you also went to Tatsuda's grocery store and bought some groceries?

A. I didn't on either occasion enter Tatsuda's store. My wife bought the groeries.

Q. Then it is your testimony that you never were in Tatsuda's grocery store on any day in the month

(Testimony of John Roger Lamb.)

of July, 1950? A. I don't believe I was. [53]

Q. And that—were you in the grocery store during the month of June, 1950?

Mr. Baskin: Your Honor, I am going to object to that as not material to the cross-examination.

The Court: Well, I assume this is a preliminary question pure and simple.

Mr. Kay: I am trying to pin down the respective dates of the conversations which occurred, your Honor.

The Court: Objection overruled.

Q. Were you in the grocery store of Bill Tatsuda any day in the month of June, if you can recall?

A. I believe I did pick up some groceries there. What day of the month, I don't remember.

Q. You were appointed, I believe, to your job this summer on the 7th day of June, 1950?

A. That is right.

Q. Is it possible you were in Bill Tatsuda's grocery store at about that time?

A. Yes. We took on supplies before we went to Quadra. Yes.

Q. Then you believe it is possible you were in Mr. Tatsuda's grocery store roughly about June 7, 1950? A. June; yes.

Q. Now, were you there at any time later in the month of June, do you recall? When did you leave —pardon me. Strike that question. When did you leave to go out to your job [54] at Boca de Quadra?

(Testimony of John Roger Lamb.)

A. I believe I left about the 8th for Boca de Quadra.

Q. 8th of June, 1950?

A. Yes. It could have been either the 7th or the 8th, but it was one of those two days, I believe.

Q. And did you return to Ketchikan at any time during the month of June after you left? Was your first trip that trip you spoke about in July?

A. Yes, I believe that was my first trip back.

Q. So as far as you can recall you were not in Ketchikan at any time from the 7th or 8th of June until about the 10th of July?

A. Yes; I would say that is fairly accurate.

Q. Well, now, sometime about the 7th of June or thereabouts when you were in the grocery store on this occasion did you have a conversation with Bill Tatsuda?

A. I don't recall that I did, other than picking up our groceries.

Q. Well, now, isn't it a fact, Mr. Lamb, that you did have a conversation with Mr. Tatsuda on about June 7th, 1950, in his grocery store at which time you urged him to come out to the Boca de Quadra and engage in illegal fishing and soliciting him to pay a bribe for that illegal fishing?

A. I don't recall anything like that.

Q. You don't recall anything like that? [55]

A. No.

Q. And going back now to the occasion when you were in town on July 10th, about July 10th, did you see Joe Patterson at any time on that day?

(Testimony of John Roger Lamb.)

A. On July 10th here in town?

Q. Here in town; Kethikan, Alaska?

A. I believe I passed him on the street.

Q. Now, is that the occasion on which you said you had this conversation with him in which he said he would see you later, or was that on July 18th?

A. Well, I know it was one of the times that I was here in town.

Q. You don't recall whether it was the first trip in or the second trip in; is that right?

A. That is right.

Q. You testified this morning, did you not, that it was on July 18th?

A. That would put it right, I believe.

Q. Well, then going back to my previous question, did you see Joe Patterson on July 10th, the first trip you were in town?

A. I don't believe so.

Q. Did you visit Tatsuda's grocery store on July 10th? A. No.

Q. Isn't it a fact, Mr. Lamb, that either on July 10th or on [56] July 18th you visited the store of Bill Tatsuda in Ketchikan, Alaska, and then and there had a conversation with Bill Tatsuda and the defendant, Joe Patterson, during the course of which conversation you solicited them to come to the Boca de Quadra where you were engaged as a stream watchman and there engage in illegal fishing and pay you a portion of the proceeds as a bribe?

A. I don't recall that.

Q. And isn't it a fact that during this same con-

(Testimony of John Roger Lamb.)

versation on either one of these two dates you told them how much money you had made selling illegal fish the season before, and told them that it was safe to come out that you had the other two men out there fixed?

A. I don't recall any such statement as that.

Q. Would you deny that on one of those occasions when you were in the store you solicited them to come out? A. I do.

Q. And do you deny that you told them that you had the other two watchmen fixed? A. I do.

Q. You did have the other two watchmen fixed, didn't you, you thought?

A. After he arrived there; yes.

Q. At that time you had—in July you had not engaged in any conversation with these other watchmen? [57] A. No.

Q. You hadn't fixed them yet; is that right?

A. There hadn't been any conversation because I didn't know them in July.

Q. You had served as watchman at Boca de Quadra two previous seasons, hadn't you?

A. That is right.

Q. How many watchmen were there during the 1949 season? A. One.

Q. How many were there during the 1948 season? A. One.

Q. This year there were three; is that right?

A. That is right.

Q. Well, continuing the conversation, did you—do you deny that during the conversation on either

(Testimony of John Roger Lamb.)

July 10th or July 18th in the grocery store of Bill Tatsuda that you told Joe Patterson in the presence of Bill Tatsuda how much money you had made during the previous season?

Mr. Baskin: Your Honor, just a minute. I object to that. That is assuming he had a conversation, and his testimony is that he did not have a conversation with him.

The Court: I thought he prefaced his question by the words "do you deny."

Mr. Kay: "Do you deny"—obviously I am laying a foundation for impeachment, your Honor. [58]

Mr. Baskin: As I understand it, he prefaced it by saying "in that conversation." I don't remember him saying "do you deny in that conversation," but I will stand corrected if the record shows otherwise, if the Court please.

The Court: I think the objection will have to be overruled.

Q. Do you recall the qeustion, Mr. Lamb?

A. No, I didn't have any conversation to that effect at all.

Q. Now, you say that on July 18th or July 10th you met Joe Patterson on the street in Ketchikan; is that right? A. That is right.

Q. And what was said; what did he say to you, and what did you say to him on that occasion?

A. As far as I know, it was just, "Hello," and he said, "I will be seeing you."

Q. That is as much as you can recall—"Hello";

(Testimony of John Roger Lamb.)

"I will be seeing you"? A. That is right.

Q. Did you understand there was something sinister about that conversation, that Mr. Patterson was going to come out and illegally fish, or anything like that? A. Not necessarily.

Q. Had you ever had any conversation up to that time with Mr. Patterson about his coming out to the Boca de Quadra and fishing illegally during the season? [59]

A. Not as to laying plans for fishing there; no.

Q. Well, had you had any conversation with him about fishing? A. Not that I recall.

Q. Do you know Joe Patterson? A. I do.

Q. How well do you know him?

A. Just an acquaintance; that is all.

Q. Since the close of the fall season in 1949, do you recall any other conversation you had with Joe Patterson down to that date? By "that date" I mean July, 1950. A. No, I can't say that I do.

Q. Did Joe Patterson—do you know whether or not Joe Patterson fished during the 1949 season?

A. I do not.

Q. You know that he had not fished prior to the 1949 season, do you not?

A. I don't know whether he fished in 1950 or not. I didn't see him fish.

Q. You didn't see him fish in 1950?

A. Or, in 1949, rather.

Q. And you don't know whether or not he had ever fished before the 1950 season; is that right?

A. That is right. Prior to 1950 I don't know.

(Testimony of John Roger Lamb.)

Q. So when you met—did you answer my question as to whether or not you had any other conversation with him prior to [60] July, 1950, about fishing? A. No.

Q. You don't recall any other conversation with him? A. Not as to fishing; no.

Q. As to bribing Government officials, had you had any conversation? A. No.

Q. As to your taking money for selling fish out of the Boca de Quadra, had you any conversation?

A. No.

Q. Had you ever up till that date according to you urged him to come out to the Boca de Quadra and fish either before or during the season in the closed area? A. No, I don't believe so.

Q. And so that this conversation July 18th or July 10th when you said, "Hello," and he said, "I will be seeing you," is the first conversation you had?

A. It was the first conversation that had any pertainsion to him being down there where I was.

Q. Did you gather from that conversation that he would be seeing you later that day around town or that he was using that just as the salutatory way in which some people say, "Well, I will be seeing you," or did you have an idea that that meant he was coming out to the Boca de Quadra and help you steal fish? [61]

A. Well, I assumed that he probably would be out there.

Q. And would bribe you to let him steal fish?

(Testimony of John Roger Lamb.)

A. Not necessarily.

Q. You just thought that meant he would be out to the Boca de Quadra? A. That is right.

Q. That is a rather popular fishing place, is it not? A. It is.

Q. Isn't it a fact that the Boca de Quadra catches the first days of the season have always been some of the best in the area? A. That is right.

Q. That is one of the best places to fish early in the season, isn't it. A. It is.

Q. Did you know at that time that Joe Patterson was going fishing in 1950?

A. I wasn't sure of it; no.

Q. Hadn't you talked to anybody about it?

A. I had seen the boat.

Q. You had seen the boat and knew that it was being rigged up for fishing?

A. That is right. I had heard that he had bought it.

Q. Who had you heard that from; do you recall?

A. That I don't know. [62]

Q. Did you talk to Bill Tatsuda about it?

A. No, I didn't.

Q. And had never talked to Joe Patterson?

A. No, sir.

Q. And now, the next time you saw Joe Patterson, I believe you testified, did you not, was on August 15th, the opening day of the season?

A. That is right.

Q. Do you recall whether or not you saw him

(Testimony of John Roger Lamb.)

on the evening of August the 14th in the Boca de Quadra area? A. I can't say that I did.

Q. Do you recall an occasion on the evening of August 14th when you observed the Rolling Wave at a point a mile or a mile and a half away from Cygnet Island and proceeded to run your speedboat over and go aboard the Rolling Wave on the evening of August 14th? A. I don't remember that.

Q. Well, isn't it a fact that you did run out a mile and a half to meet the Rolling Wave as it came into the Boca de Quadra, your anchorage behind Cygnet Island? A. On August 15th?

Q. On August 14th, Mr. Lamb?

A. I don't recall that.

Q. And isn't it also a fact you went aboard the Rolling Wave and there held a conversation with Joe Patterson? [63] A. No.

Q. And isn't it further a fact that on the evening of August 14th while you were aboard the Rolling Wave you again solicited Joe Patterson to come into the closed area of the Boca de Quadra and fish and to give you money for fishing in that area, sir?

A. No.

Q. And isn't it a fact that on that occasion you again reassured Joe Patterson that you had the other two agents of the Fish and Wildlife Service that were in the area fixed? A. No.

Q. And did you have them fixed on August 14th?

A. As I recall, it was on August 15th when I first went aboard.

(Testimony of John Roger Lamb.)

Q. Isn't it possible it was the evening of August 14th, the night before the season opened?

A. Well, as I remember it, it was August 15th when I first met the man out there in that area with his vessel.

Q. But it is possible, is it not, that it was the night of August 14th? A. I hardly think so.

Q. You hardly think so. And isn't it a fact that in that conversation you urged them to go into the closed area and fish that very evening, the night of August 14th? A. No. [64]

Q. And told them that there were a lot of salmon up in the mouth of the creek, three or four thousand?

A. I don't recall that on the evening of August 14th at all.

Q. And isn't it a fact that they then and there told you they would look awfully silly with a hold full of fish and a wet net the morning that the season opened, and that they refused to go in that evening? A. I don't remember that at all.

Q. Well, now, in this conversation which you say occurred on the morning of August 15th did you on that occasion run out to the boat in your speedboat? A. I did.

Q. And you went about a mile and a half to meet the boat when it came in; is that about right?

A. Well, I don't know as it was that far.

Q. Well, it was as they came around the other island that is about a mile and a half away from Cygnet Island; was it?

(Testimony of John Roger Lamb.)

A. About a half a mile would probably put it pretty close.

Q. And I believe you testified, did you not, that you did not go aboard the boat on that occasion?

A. That is right.

Q. But that you remained in your speedboat alongside the Rolling Wave?

A. That is right.

Q. And I believe you testified on direct examination, did you [65] not, that you had a conversation with Joseph Patterson at that time?

A. That is right.

Q. I believe you testified that Patterson asked about fishing in the closed area at that time?

A. That is right.

Q. Is that the first occasion, Mr. Lamb, according to your testimony upon which you ever discussed with Joe Patterson the question of illegal fishing or fishing in the closed area of the Boca de Quadra? A. It is.

Q. And is it your testimony that he asked about such fishing, inquired of you about such fishing?

A. Will you ask that again please?

Q. I said, is it your testimony, Mr. Lamb, that Joseph Patterson asked you about such fishing?

A. That is right.

Q. I believe you testified, did you not, that someone during that conversation named the price at one hundred dollars a thousand fish?

A. That is right.

(Testimony of John Roger Lamb.)

Q. And that he agreed to pay right afterwards?

A. He agreed to pay the following evening, or twenty-four hours later.

Q. And I believe you testified on that occasion that you told [66] Joe Patterson that there were two other agents in the area and that you had to split with them? A. That is right.

Q. And told them you had made a fix? When did you make the fix?

A. Shortly after I met him out there. I figured that they could be talked into it.

Q. In other words it is your testimony that at that time you had not approached one of these other agents with regard to illegal fishing?

A. That is right.

Q. But that you told Joe Patterson that you had; is that right?

A. That is right.

Q. Thinking that you could fix it with them?

A. Yes; being fairly sure of my grounds.

Q. You felt, you had had some conversations which led you to believe that, that you could fix it?

A. Yes; I would put it that way.

Q. At the time you had these conversations with them which led you to believe that they could be fixed, had you talked to anybody about coming in there and fishing illegally?

A. Other than Mr. Patterson, you mean?

Q. Yes.

Mr. Baskin: Your Honor, I object to any ques-

(Testimony of John Roger Lamb.)

tion [67] along that line. Even if true, it is immaterial. It is not admissible.

Mr. Kay: I see no objection to it.

Mr. Baskin: Well, this defendant is the only one on trial. We are not trying anybody but Joe Patterson and——

The Court: Will you repeat the question please?

Court Reporter: Q. "At the time you had these conversations with them which led you to believe that they could be fixed, had you talked to anybody about coming in there and fishing illegally?"

A. "Other than Mr. Patterson, you mean?"

Q. "Yes."

The Court: Well, I think in view of the defense that has been announced here that it is competent. Objection overruled.

Q. Did you understand the question, Mr. Lamb?

A. Well, I am kind of fouled up now.

Q. Let's start again. You say that the first time you saw Joe Patterson and talked to him about illegal fishing was the morning of August 15, 1950, in the area of Boca de Quadra; is that right?

A. That is right.

Q. You never had talked to him at any time prior to that about illegal fishing in that area or about accepting a bribe?

A. That is right. [68]

Q. Now, you say that prior to that time, however, you had had conversations with the other two stream watchmen? A. Yes.

Q. What is it—Richard Warner? A. Yes.

(Testimony of John Roger Lamb.)

Q. And, I believe, Cottrill? A. Cottrill.

Q. Which led you to believe that they would accept a bribe also and go along with some illegal fishing; is that right? A. That is right.

Q. Well, now, what I am getting at is what brought that subject up with them; had you asked other people to come in there? A. No.

Q. You hadn't?

A. After I had talked to Patterson I was just running on sheer luck that I could talk them into it.

Q. Well, but what I am getting at, Mr. Lamb, is you say that you had these conversations with them, which led you to believe that they would go along with you, prior to the time you first talked to Joe Patterson?

A. If that is the idea that you have, why you misunderstood me, because I didn't talk to them on that until after I had talked to Mr. Patterson. [69]

Q. Up until that point then you had never mentioned anything to them?

A. I just figured that I could run on luck and take them in because they seemed to be young fellows and they would go for it, which they did.

Q. Well, didn't you say just a few minutes ago on direct examination, on cross-examination, right here that something in conversations with them had led you to believe that they would go along?

A. Well, in their conversation they seemed to be easy, friendly and easy. They acted like they wanted money.

Q. Had you had such a conversation with them

(Testimony of John Roger Lamb.)

in which you got that idea prior to Joe Patterson's apperance there on the morning of August 15th; is that right?

A. Just through their general talk; yes.

Q. But that was prior to August 15th?

A. That is right.

Q. And so you thought at that time, prior to going aboard Joe Patterson's boat, you thought at that time that they would probably go along with the deal for illegal fishing?

A. Well, that was my general idea; yes.

Q. And in fact you told Joe Patterson they would go along; is that right?

A. That is right.

Q. And that you had it fixed; did you not? [70]

A. That is right.

Q. Then you had it in your mind to sell fish and take a bribe prior to meeting Joe Patterson the morning of August 15th, didn't you?

A. I had it in my mind, if someone would jolt me, I would accept it.

Q. If someone came along, why you would go along? A. Yes.

Q. As a matter of fact, Mr. Lamb, during the month of June and July you solicited several other people to come out there and fish in the Boca de Quadra and split the take with them, did you not?

A. Not that I recall.

Q. Now, isn't it a fact—you know Chester Klingbeil, do you not, a fisherman here in town?

A. I know of him; yes.

(Testimony of John Roger Lamb.)

Q. Did you ever have any conversation during the month of June or July, 1950, with Chester Klingbeil in the City of Ketchikan, Alaska, in which you solicited him to come to the Boca de Quadra and fish illegally and split the take with you?

A. Not that I recall; no.

Q. You know Rollie Lindsey, do you not?

Mr. Baskin: Your Honor, I am going to object to that. Again I don't see where all this is material. [71]

Mr. Kay: I just asked him if he knew Rollie Lindsey.

Mr. Baskin: Well, it is still immaterial as to the defendant's guilt of giving him a bribe on two occasions.

The Court: Well, I think that it is merely preliminary, the question you object to now, preliminary to asking the same questions that he has asked with reference to others, and in view of the announced defense and the rulings of the Court I think the objection will have to be overruled.

Q. You may answer the question.

The Court: It is somewhat out of order, but he has definitely promised to connect it up.

Q. You know Rollie Lindsey, do you not?

A. I do.

Q. Otherwise known as Blackie; do you?

A. That is right.

Q. Skipper of the Diamond T, is he not?

A. That is right.

Q. Did you see the Diamond T in the area of

(Testimony of John Roger Lamb.)

the Boca de Quadra near Cygnet Island on the morning of August 20th, Sunday, 1950?

Mr. Baskin: I object to any testimony along that line for the same reason. It is imaterial as to who else was out there. The defendant is the only one that is here on trial, and they are just trying to insert in a lot of evidence [72] that is immaterial, irrelevant and prejudicial and shouldn't be entered.

Mr. Kay: May I be heard?

The Court: Well, it would be prejudicial to the prosecution if there was no evidence to amount to anything introduced by the defense of entrapment, but there has already been a promise to do that, and in view of that I think that the objection will have to be overruled because I think it is competent.

Q. You may answer the question. Do you recall the question?

A. What was that again about Mr. Lindsey?

Q. Well, it was about Mr. Lindsey on the Diamond T being in the area of the Boca de Quadra near Cygnet Island on the morning of August 20, 1950?

A. I am not sure just as to his location, but I know he was out there.

Q. And you went aboard the Diamond T on that occasion, did you not?

A. I don't recall going aboard.

Q. Well, did you go aboard the Diamond T on any—what is the first time you recall seeing the Diamond T in the area of the Boca de Quadra this summer?

(Testimony of John Roger Lamb.)

A. Somewhere around that date that you mentioned. I am not positive of the date.

Q. August 19th, 20th, 21st, sometime around there? [73]

A. Somewhere in there. I remember seeing the boat there.

Q. Well, did you at that time when you saw the Diamond T in the area go aboard the Diamond T?

A. I don't recall going aboard.

Q. Well, now, isn't it a fact, Mr. Lamb, that you did go aboard the Diamond T on that occasion and then and there in the presence of Rollie Lindsey and his cook, whose name I do not know but who will be produced here, but isn't it a fact in their presence you had a conversation with Rollie Lindsey, the skipper of the Diamond T, in which you solicited him to come into Boca de Quadra and catch fish illegally and split the take with him?

A. I don't recall that I did.

Q. Well, isn't it a fact that you had such a conversation? You know that you did, do you not, Mr. Lamb? A. I don't recall it.

Q. And isn't it also true that in that same conversation that Rollie Lindsey refused to go in on grounds that it was Sunday and that he would look silly, again, with a hold full of fish and a wet net on Sunday, a day which was closed to fishing; do you recall that?

Mr. Baskin: Your Honor, even though they have announced that the defense is of entrapment of this defendant, the fact that he might have solicited

(Testimony of John Roger Lamb.)

other persons unconnected with the defendant is wholly immaterial, and even suppose [74] that he had, it wouldn't make any difference as to this defendant bribing him. A solicitation of another person doesn't justify another one to come in and pay a bribe.

Mr. Kay: May I be heard, your Honor?

The Court: Well, I don't think it is necessary. I think that where he denies any entrapment of the defendant that this is proper cross-examination. Objection overruled.

Q. Well, you did solicit Blackie Lindsey to go in and fish about August 19th, 20th or 21st, didn't you—ask him to come in and fish?

A. I don't recall that; no.

Q. And you did solicite Chester Klingbeil to come out and fish even before the season started, did you not? A. I don't recall that either.

Q. I see. Well, now, you testified, I believe, did you not, on your direct examination that on August 16, 1950, you saw the Rolling Wave in the area of Cygnet Island, Boca de Quadra?

A. On August 16th?

Q. Yes, sir. A. Yes.

Q. And I believe you testified on direct examination that you had a conversation with Patterson on that occasion, did you not?

A. That is right. [75]

Q. And that he asked—you testified, did you not, that he asked, "How about this evening?"

A. Yes.

(Testimony of John Roger Lamb.)

Q. And that you replied, "The coast is clear"?

A. That is right.

Q. Now, you had already told Patterson, had you not, that the other two agents would be sent to different points away from the immediate area of the illegal fishing and would signal in case they saw anybody coming? A. That is right.

Q. You had explained a signal, a light system, had you not? A. That is right.

Q. And when had you told him that would occur? When had you told him that?

A. If anyone should happen to show up that would arrest him in the area.

Q. When did you tell Joe Patterson that about the signals?

A. I believe that was the evening of the 16th.

Q. The evening of the 16th? A. Yes.

Q. Then I believe you testified that the Rolling Wave went on into the closed area and fished inside the markers on the evening of August 16th?

A. That is right.

Q. And did you see the Rolling Wave come out of the closed [76] area? A. I did not.

Q. Where were you at the time they quit fishing and left; do you know?

A. As far as I know, I was on board my boat.

Q. Well, do you know whether or not the Rolling Wave was back in the area on August 17th?

A. No, I don't know whether he was there or not.

Q. Now, let's see, August the—what are the dates

(Testimony of John Roger Lamb.)

on that? August 15th was on what day of the week; do you recall?

A. No, I don't recall what day it was, other than the 15th. It was on a Monday, wasn't it? I don't know for sure. I am just guessing about that.

Q. Suppose you glance at this? I will hand you what purports to be an official tide table put out by the Tongass Trading Company, put out for the year 1950, and ask you if that would refresh your recollection as to the days of the week, that portion of the tide table?

A. Well, I guess the 15th, that was on a Tuesday.

Q. Monday was the 14th; Tuesday, the 15th?

A. That is right.

Q. And Wednesday then was the 16th, was it not? A. That is right.

Q. Now, it is your testimony that on Wednesday evening they went in and caught these fish? [77]

A. That is right.

Q. And didn't they come back into the area of the Boca de Quadra on Thursday evening, August 17th, Mr. Lamb?

A. I don't recall seeing them on the 17th.

Q. Well, don't you recall going aboard the boat on the evening of August 17th in order to be paid for the fish which had been caught the night before?

A. No. I recall that as the night of the 18th. It was the 18th as well as I remember it.

Q. Well, then you went a little overtime to get your first pay, didn't you? A. That is right.

(Testimony of John Roger Lamb.)

Q. If they didn't get back there until the 18th?

A. That is right.

Q. The deal was that you were to get your money within twenty-four hours?

A. That is right.

Q. Well, now, doesn't that refresh your recollection that they came back in on the evening of August 17th, the next night, said they had been in Ketchikan, sold their fish; you went aboard the boat, and Joe Patterson paid you a sum of money as your share of the fish?

A. I don't believe it was the 17th.

Q. And I believe you testified that on the—according to your testimony then on direct examination, no money was paid to [78] you until Friday evening, the 18th of August?

A. That is right.

Q. And that at that time the sum of one hundred and eighty dollars was paid?

A. That is right.

Q. Well, isn't it a fact that on the evening of August 17th you were paid a sum of money by Joseph Patterson in the cabin of the Rolling Wave?

A. I don't recall that; no.

Q. And how much money did you say you were paid?

A. Well, all I know is I just pulled it out. It was one hundred and eighty dollars. It was counted out.

Q. What was the deal that you had made with Mr. Patterson?

(Testimony of John Roger Lamb.)

A. One hundred dollars a thousand.

Q. And that would be what? Eighteen hundred fish? A. I imagine.

Q. As a result of the fishing on the evening of the 16th? A. That is right.

Q. Well, isn't it a fact, Mr. Lamb, that Mr. Patterson paid you on that occasion the sum of two hundred and eighty dollars?

A. I don't believe so.

Q. Well, could it be possible that he did pay you two hundred and eighty dollars and that maybe you didn't want to split all of that with your fellow agents so you put a [79] hundred in your pocket?

A. I don't believe so. I wadded it altogether and took it over to the Chris-Craft.

Q. But it is possible it might have been two hundred and eighty?

A. If it was, I certainly didn't get any part of two hundred and eighty.

Q. They shortchanged you? Well, now, you say you did come aboard the boat on the evening of the 18th? A. That is right.

Q. And I believe you testified, did you not, that a conversation occurred with Joseph Patterson at that time? A. That is right.

Q. And I believe you said that conversation started off with Patterson asking you, "How about going in and fishing this evening?" A. Yes.

Q. And that you told him all was clear and to go on in? A. That is right.

(Testimony of John Roger Lamb.)

Q. Did you recall on that conversation anything being said about some fish which they had already caught and had in the hold?

A. It seems to me he did say something about that, that there were fish in the hold.

Q. And didn't he show you, ask you to take a look so he [80] wouldn't shortchange you on what fish he caught illegally? Do you remember that he told you to take a look and guess how many fish there were down there, and you said about two hundred? A. I don't recall the number.

Q. It could have been about two hundred, couldn't it? A. It is possible.

Q. And then I believe you said that he went on in and fished that evening, the evening of August 18th? A. That is right.

Q. Friday evening? Now, when did you get your pay for those fish?

A. As well as I recall, it was on a Monday.

Q. So again more than twenty-four hours passed? A. That is right.

Q. And on Monday how much did you receive?

A. As well as I remember, it was a hundred dollars.

Q. Isn't it a fact, Mr. Lamb, that the first payment to you on the evening of August 17th was two hundred and eighty dollars?

A. If it was, I sure didn't know about it.

Q. And that the second payment—now, he fished on the evening of August 17th, didn't he; fished on the evening of the 16th; fished on the evening of the

(Testimony of John Roger Lamb.)

17th; and skipped and fished on the evening of the 19th; isn't that right? [81]

A. I didn't recall him fishing on the evening of the 17th. I didn't even see him the 17th as far as I remember.

Q. Did he fish on the evening of the 19th?

A. I am not sure of that either.

Q. It is your testimony that you only know of two occasions? A. That is right.

Q. Well, isn't it a matter of fact that your second payment received from Joseph C. Patterson was in the amount of two hundred and fifty dollars?

A. Not that I recall; it wasn't.

Q. And also isn't it a fact that the payment on Monday, August 21st, was in the amount of twenty dollars because they only got a few fish that time?

A. I don't remember anything about that.

Q. Other than this one occasion, Mr. Lamb, on which you say you tossed the money on the desk in the Chris-Craft and it was divided up by Richard Warner—— A. That is right.

Q. Did you pay any other money to your fellow Fish and Wildlife agents in the area to permit illegal fishing in the Boca de Quadra this summer?

A. This summer? No.

Q. Have you ever been convicted of a crime, Mr. Lamb? A. Up until this, no.

Q. It is a fact, is it not, that you have plead guilty to the [82] crime of accepting a bribe?

A. That is right.

Q. And that you are awaiting sentence?

(Testimony of John Roger Lamb.)

A. That is right.

Q. You have not yet been sentenced?

A. No, I haven't.

Q. Do you have any hope of obtaining any better or more lenient treatment because of your testimony in this case? A. No, I don't.

Q. You are just taking your chances?

A. That is right.

Mr. Kay: Pardon me a moment, Your Honor. Just about one more question.

Q. During these occasions, conversations with Mr. Patterson, when you claim that he paid you the money, Mr. Lamb, isn't it a fact, don't you recall, that Joe showed you the fish tickets?

A. No, I don't.

Q. You don't remember that he showed you the fish tickets to verify the amount that he sold?

A. No.

Q. And that your split on the first ticket was two hundred and eighty dollars; don't you recall that?

A. He may have showed them to me but, if he did, I don't remember it. [83]

Q. You didn't bother to check the ticket against the money that you were getting? A. No, sir.

Q. You were willing to take a bribe but you just relied on the other fellow as to how much you were going to get? A. That is right.

Mr. Kay: That is all.

(Testimony of John Roger Lamb.)

Redirect Examination

By Mr. Baskin:

Q. John, I believe you stated on direct examination that the first bribe was given you on or about August 19, 1950, and, as I remember your cross-examination, you stated it was on the 18th. Now, was it on the 18th or 19th that you received the first one hundred and eighty dollars?

A. Well, on second thought I am pretty sure it was on the 19th because, let's see, that was the day the season closed at six o'clock in the evening; that was on a Saturday if I am not wrong.

Q. August 19th?

A. That is right. Isn't that on a Saturday?

Q. I would like to show you a calendar and have you examine and look at August 19, 1950, and see what day that is on.

A. That is right. It is on the 19th. That is on the evening it closed. [84]

Mr. Kay: I didn't hear the answer.

A. That was on a Saturday, the 19th.

Q. That is the day that he gave you the one hundred and eighty dollars?

A. Yes, as I remember it, and what draws my attention to the fact is that it was the evening the season closed and I figured I would have a day off the following Sunday.

Q. And at that time he paid you only one hundred and eighty dollars; is that your testimony?

A. As far as I know; yes.

(Testimony of John Roger Lamb.)

Q. Now, the money that you received from Joe Patterson on that occasion, did you give it all, or part or all of it to Richard Warner aboard the Chris-Craft?

A. I wadded it up and put it in my watch pocket and presented it to him as I got it.

Q. And that was all the money that Joe Patterson gave you?

A. That is what Richard Warner counted out.

Q. And he counted out one hundred and eighty dollars? A. That is right.

Q. And then on August 21st, that was a Monday, I believe you stated, and—is that the day that the defendant paid you the one hundred dollars?

A. On the 21st?

Q. Yes. A. Yes. [85]

Mr. Baskin: No further examination.

Mr. Kay: No recross.

(Witness excused)

RICHARD E. WARNER

called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination

By Mr. Baskin:

Q. What is your full name?

A. Richard E. Warner.

Q. What is your home? Where are you from?

A. Santa Ana, California.

(Testimony of Richard E. Warner.)

Q. Whom were you employed by during the summer of 1950?

A. Employed by the Fish and Wildlife Service here in Ketchikan.

Q. Is the Fish and Wildlife Service a department of the United States Department of Interior?

A. Yes, it is.

Q. And what was your title or your position with the Fish and Wildlife Service?

A. I was rated a GS 5, enforcement patrolman.

Q. Tell the jury what your duties were in connection with your employment.

A. To patrol the areas that needed the protection from illegal fishing, to enforce all fish and game laws for this [86] area of the country.

Q. Was that for the Territory of Alaska, enforce the laws and regulations conserving fish and game for the Territory of Alaska?

A. Yes; as constituted by the federal acts of the United States.

Q. And what area of the Territory of Alaska were you assigned to patrol or protect from illegal fishing? A. The Boca de Quadra area.

Q. And is that in the Territory of Alaska?

A. Yes, sir, it is.

Q. Did you during the summer of 1950 patrol that area as a Fish and Wildlife agent in conserving fisheries? A. I did.

Q. Will you come down here a minute, Richard, and I want to ask you to examine the blackboard. I show you Government's Exhibit No. 1 and ask

(Testimony of Richard E. Warner.)

you to point out the area which you worked in patrolling and conserving fisheries in 1950 as an agent for the Fish and Wildlife Service.

A. We were concerned with all the Quadra area there. We were concerned with the salmon which congregate at the head of the main arm in Quadra, Quadra Arm and Mink Bay or Mink Arm, principally Mink Arm because the fish school there the earliest and the most during the pink salmon season.

Q. Now, then, is there a creek flowing into Mink Bay or Mink [87] Arm which is known as Humpback Creek? A. Yes.

Q. And the area one statute mile from the mouth of that creek in all directions is closed to commercial fishing for salmon?

A. Yes. It is definitely marked.

Q. You may be seated. Thank you. Mr. Warner, do you know the defendant, Joe Patterson, Joseph C. Patterson, also known as Joe Patterson?

A. Yes, I do.

Q. Is this the defendant sitting over here by his attorney? A. Yes, sir; he is the one.

Q. Did you see him on or about the 14th of August, 1950? A. Yes, I did.

Q. Where did you see him?

A. He was in the vicinity of Orca Point in Boca de Quadra.

Q. Did you have occasion to go aboard his boat at that time?

A. Yes. Eugene Cottrill, another enforcement patrolman, with myself boarded the Rolling Wave

(Testimony of Richard E. Warner.)

on a routine check prior to the opening of the salmon season.

Q. What were you checking for?

A. For any evidence of illegal fishing or other fish and game violations.

Q. At the time who did you see? Did you talk with anybody?

A. Yes. I talked with the skipper of the boat. [88]

Q. Do you know his name?

A. No, I don't.

Q. You just talked with him? A. Yes.

Q. Did you examine the boat then for possible violations?

A. Yes. I identified myself to him as we are required to do.

Q. And how? How did you identify yourself?

A. I introduced myself as Richard Warner of the Fish and Wildlife Service and told him that I wanted to check the boat for any violations.

Q. And did he permit you to do that?

A. Yes, he did.

Q. Did you see the defendant aboard the vessel at the time? A. Yes, sir, I did.

Q. Now, then, did you have an occasion to investigate a possible fishing violation on the part of the defendant Joseph Patterson and a possible bribery violation on his part during this fishing season?

A. Yes, I did.

Q. Who first called that to your attention?

A. I heard about it here in town and instructed

(Testimony of Richard E. Warner.)

John Wendler about it, the enforcement agent who employed me this summer, and then he took it immediately to the District Attorney.

Q. Well, just a minute. Who first—did Lamb tell you about [89] this possible violation?

A. No, he didn't.

Q. Well, did you, in connection with your employment did you see John Roger Lamb on or about the 15th of August, 1950? A. Yes, I did.

Q. Where did you see him?

A. John Lamb?

Q. Yes.

A. I saw him during the day several times there.

Q. What was he doing?

A. He was on board his boat most of the time, anchored in Mink Arm.

Q. And did you talk with him during that day?

A. Yes, I did.

Q. At this point I would like to ask you, are you the captain and skipper of the Fish and Wildlife vessel known as the Chris-Craft? A. Yes, sir.

Q. And you were during the entire season of 1950? A. Yes, I was.

Q. Now, did you talk with Lamb on August 15, 1950?

A. Yes. I had several conversations with him.

Q. Did you have an occasion to see the defendant Joe Patterson on August 15, 1950?

A. Yes, I did. [90]

Q. Where did you see him?

(Testimony of Richard E. Warner.)

A. He was aboard the boat Rolling Wave which was anchored in Mink Arm.

Q. Who was with you when you saw him?

A. John Lamb.

Q. How did you get to the Rolling Wave?

A. We were in John Lamb's skiff, an outboard skiff.

Q. Did you pull up alongside the Rolling Wave?

A. Yes, we did.

Q. About what time of the day was that?

A. Approximately seven-thirty in the evening.

Q. Did you go aboard the vessel the Rolling Wave? A. Yes, we did.

Q. Who went aboard?

A. John Lamb and myself.

Q. And you saw Patterson there at the time?

A. Yes.

Q. Did you and Lamb have a conversation with Joe Patterson? A. Yes, we did.

Q. Where was that?

A. That was aboard the Rolling Wave at the time.

Q. Tell the jury what you said, what John Lamb said, and what the defendant Joseph Patterson said in that conversation.

A. I was introduced to Joseph Patterson at that time. Mr. Patterson—— [91]

Q. Who introduced you?

A. John Lamb did. Joseph Patterson asked John Lamb if I was one of the boys. John Lamb replied, "Yes. He is one of the Fish and Wildlife

(Testimony of Richard E. Warner.)

men. He is skipper of the Chris-Craft, patrolling the Boca de Quadra area with me for the summer here." And then Mr. Patterson replied—let's see—"Will he be cut in on this?" And John Lamb replied, "Yes. We are going to split three ways." And Patterson then said, "There will be enough for everyone." That is the way he put it.

Q. Did Lamb also say whether or not John D. Wendler had sent you down to patrol in the area?

A. Yes, I believe he did at that time.

Q. Was there any other conversation that you remember?

A. John Lamb explained the signal arrangement briefly to Joseph Patterson, and Mr. Patterson also asked about the fishing prospects at that time.

Q. You mean the fishing prospects where?

A. Within the stream markers in the closed area in Mink Arm.

Q. The closed area of what? What part of the area was he inquiring about?

A. Specifically the mouth of Humpback Creek in Mink Arm.

Q. And you mean within the closed area near the mouth of Humpback Creek of Mink Arm in Boca de Quadra? A. That is right. [92]

Q. Was there any answer or reply to that, do you know?

A. Yes. After Mr. Patterson asked John Lamb how it would be, Lamb replied that he thought it would be unwise to do any fishing at that time because the fish had not schooled up sufficiently to

(Testimony of Richard E. Warner.)

warrant making a set; it wouldn't pay off enough.

Q. Now, after this conversation what did you do?

A. I went back to the Chris-Craft after that.

Q. Did Lamb go to the Chris-Craft with you?

A. Yes; he did for a while.

Q. And you and Lamb went alongside the Rolling Wave in Lamb's skiff; is that correct?

A. That is correct; yes.

Q. And then you went back to the Chris-Craft, and how did you go?

A. We went in the skiff.

Q. With Lamb's skiff from the Rolling Wave back to the Chris-Craft?

A. Yes; that is right.

Q. Now, on or about August 16, 1950, did you have an occasion to see John Wendler, Dan Ralston and Bob Meeks? A. Yes, I did.

A. Yes, I did.

Q. Who is John Wendler?

A. He is the enforcement agent in charge of the Ketchikan area. [93]

Q. Who is Dan Ralston?

A. He is the enforcement supervisor for the entire Alaska area.

Q. Of the Fish and Wildlife Service?

A. Yes, sir.

Q. Tell the jury whether or not at that time you advised John Wendler and Dan Ralston of the facts as you knew them as of that time regarding a possible bribery or illegal fishing violation?

(Testimony of Richard E. Warner.)

A. Yes, sir, I did that. At that time I turned over what I had.

The Court: Well, when you say, "I turned over what I had," do you mean information or money?

A. Oh. I submitted as detailed a report as I could. I had written it up for him, explaining what I had found and what had happened at that time.

Q. That was with regard to the possible illegal fishing and the possible bribery which was to come later; is that correct? A. That is correct.

Mr. Kay: What day was this?

Mr. Baskin: August 16, 1950.

Mr. Kay: Thank you, Mr. Baskin.

The Court: Where was Wendler when you told him about this? [94]

A. They arrived—it was at the head of Mink Arm—in a Widgeon airplane owned by the Fish and Wildlife Service.

The Court: Did they happen to arrive there, or did they receive advance information and is that why they came? A. No. They just arrived.

Q. And that is where Dan Ralston was; he was also there near Mink Arm when you advised them of the information you had; is that right?

A. Yes.

Q. Now, on or about the 18th of August, 1950, tell the jury whether or not you were aboard the Chris-Craft and anchored in the vicinity of Cygnet Island, Boca de Quadra?

A. I was at that time; yes.

Q. Who was with you?

(Testimony of Richard E. Warner.)

A. Eugene Cottrill, another enforcement patrolman, and myself were there.

Q. Was John Lamb with you?

A. Part of that time he was; yes.

Q. What time was that, do you know, or about what time it was?

A. John Lamb came aboard in the course of the evening.

Q. Did you talk with John Lamb aboard your vessel that evening? A. Yes, we did.

Q. Did he advise you whether or not the Rolling Wave was to [95] make a set that same evening?

A. Yes, sir, he did.

Q. That he was going to fish illegally on the evening of the 18th?

A. Yes; those arrangements had been made.

Q. Now, then, did you see or hear or know whether or not a vessel passed by Cygnet Island and went into the vicinity of Mink Arm on the evening of August 18, 1950?

A. Yes. At about nine-thirty p.m. that night, I believe it was, we heard a boat, unidentifiable because of the darkness, go into the Mink Arm area, and a few minutes later we felt the swells rocking our boat as the unidentified boat passed us.

Q. Was Lamb with you at that time?

A. Yes; he was.

Q. After the boat passed by, what did Lamb do?

A. Lamb remarked, as we heard this boat come into the area, to the extent that, "Well, there goes the Rolling Wave in to make a set."

(Testimony of Richard E. Warner.)

Q. And what did he do after he said that?

A. Shortly thereafter he left us, saying that he was going to go up and see how things were coming, referring to the illegal set being made by this boat.

Q. And then did he go up into the area of Mink Arm or Mink Bay? [96]

A. Yes. He took his skiff and went up that way.

Q. Did you see John Lamb any more that evening, that is the evening of the 18th?

A. No, we did not.

Q. And at the time he left you and Cottrill were aboard the Chris-Craft anchored in the vicinity of Cygnet Island? A. Cygnet, yes; that is right.

Q. On or about the 19th of August, 1950, did you have an occasion to see John Wendler?

A. Yes; we did at that time.

Q. That was on the 19th?

A. On the 19th; yes.

Q. Did you tell him whether or not a bribe had been paid to John Lamb as of that time?

A. When he arrived we told him that no money had changed hands to our knowledge.

Q. That was on the 19th? A. Yes.

Q. And what time of the day was that?

A. It was approximately, I think it was about four-thirty in the afternoon.

Q. Now, then, at any time after that did you have an occasion to see John Lamb?

A. Later that night he came aboard our vessel.

Q. Where were you when he came aboard the vessel? [97]

(Testimony of Richard E. Warner.)

A. Eugene Cottrill and myself were inside sitting at the table reading.

Q. Inside the Chris-Craft? A. Yes.

Q. Where were you anchored?

A. We were anchored by Cygnet Island in Mink Arm.

Q. What did he do and say to you when he came aboard?

A. Immediately when he came aboard he pulled out a roll of bills or several bills, laid them on the drainboard, and said, "Here they are, Skipper. You count them," referring to the money that he had put on the drainboard.

Q. And did he put money on the drainboard?

A. Yes, he did. He laid one hundred and eighty dollars there on the sink.

Q. Was that money used by the United States Government? Was that money of the United States of America?

A. Oh, yes; it was American bills.

Q. What was it? In coins, silver or in paper bills? A. It was in paper bills.

Q. What did he say to you when he gave that money to you?

A. After he told me to divide the money, he made remarks to the effect that we could depend upon Joe Patterson, that he wouldn't let us down as far as paying off for any illegal fishing that he had done.

Q. Now, he handed you one hundred and eighty dollars. What [98] did you do with that?

A. I divided it into three piles.

(Testimony of Richard E. Warner.)

Q. What—did you give him any of it?

A. Yes. John Lamb took sixty dollars of that money and pocketed it.

Q. What did you do with the other one hundred and twenty?

A. I put it in a personal envelope, an airmail envelope of my own, sealed it and put it in my personal effects.

Q. Did you retain possession then of the one hundred and twenty dollars?

A. Until the next evening when one of our patrol boats came into the area, and at that time I turned it over to another enforcement agent.

Q. Mr. Warner, I show you an airmail—just a minute.

Mr. Baskin: I would like to have this marked for identification, one airmail envelope containing one hundred and twenty dollars.

The Court: Do you intend to introduce it by this witness?

Mr. Baskin: Yes, I do, your Honor.

The Court: Then it is not necessary to mark it for identification.

Mr. Baskin: Very well. Thank you.

Q. I show you an envelope, an airmail envelope. I ask you to examine that and tell the jury what it is. [99]

A. It is either the same or an identical airmail envelope in which I put one hundred and twenty dollars, the bribery money.

Q. That is the one hundred and twenty dollars,

(Testimony of Richard E. Warner.)

a part of the one hundred and eighty that John Lamb gave you on or about the 19th of August, 1950? A. Yes, sir.

Q. And you put the money in an envelope similar to that one? A. Yes. Identical.

Q. And what did you do with that envelope containing the one hundred and twenty dollars that you put in there?

A. Immediately after putting the one hundred and twenty dollars in I sealed the envelope and put it with my personal effects where I would be sure to have it.

Q. And then what did you do? Did you retain possession of it?

A. Yes; as I say, until the next evening when a Fish and Wildlife patrol boat came in and I turned the envelope containing the money over to another one of our agents.

Q. Who did you give it to?

A. To Charles Graham.

Q. Is he an agent of the Fish and Wildlife Service? A. Yes, he is.

Q. And what day did you give it to him?

A. That was August 20th. [100]

Q. Is this the only envelope—was that the only envelope that you gave Charles Graham?

A. Yes, sir.

Q. Containing money? Was it the only airmail envelope that you gave him on that day or any other day? A. Yes; the only one of any kind.

Mr. Baskin: Your Honor, I am sorry I might

(Testimony of Richard E. Warner.)

have been mistaken. Your Honor, I offer this envelope containing one hundred and twenty dollars in evidence.

The Court: Well, in view of the stipulation I suppose there is no objection?

Mr. Kay: I won't even ask to look at it, your Honor. No objection.

The Court: It may be admitted and marked.

Mr. Kay: I take it it is one hundred and twenty rather than one hundred and eighty; is that what you said?

Q. I ask you to examine the envelope and the money and count that and tell the jury what it is.

A. There are six twenty-dollar bills American currency.

Q. And is that one hundred and twenty dollars in American money? A. Yes, it is.

Mr. Baskin: Very well. We offer it in evidence, your Honor.

Clerk of Court: The exhibit has been marked Plaintiff's [101] Exhibit No. 2.

Q. Now, tell the jury whether or not John Roger Lamb gave you any other money while you were patrolling the area for the Fish and Wildlife Service during the fishing season of 1950?

A. No, he did not. There was no more money exchanged.

Mr. Baskin: You may cross-examine the witness. Oh, I would like to ask the witness one other question if you don't mind, sir?

Mr. Kay: No, not at all.

(Testimony of Richard E. Warner.)

Q. At the time John Roger Lamb gave you that one hundred and eighty dollars, who else was present? A. Eugene Cottrill.

Q. He was aboard the vessel?

A. Aboard the Chris-Craft.

Q. And he is also an agent of the Fish and Wildlife Service? A. That is right.

Q. Did he see John Roger Lamb give you the money? A. Yes, he did.

Q. And did he watch you count it out?

A. Yes.

Q. And divide it? A. Yes.

Q. And retain possession of it?

A. That is correct. [102]

Mr. Baskin: You may examine the witness.

Cross-Examination

By Mr. Kay:

Q. Richard, were you employed by the Fish and Wildlife the 1949 season?

A. No, sir, I was not.

Q. This is your first year?

A. That is correct.

Q. You started to say something about that you had heard something about this before you went out there this year. What was it you were going to say there, Richard. The United States Attorney cut you off a little there.

Mr. Baskin: Well, your Honor, he can ask the witness a direct question as to what he wants to know.

(Testimony of Richard E. Warner.)

Mr. Kay: I am asking the direct question—what was it he was going to say?

Mr. Baskin: Well, the witness can only answer, your Honor, in answer to questions that are asked. It should be that way so we can know whether or not it is material or irrelevant to the issues.

The Court: Well, it is impossible to tell of course what the answer will be, but the objection is overruled.

Q. You may answer, Richard.

A. I had heard reports to the effect that John Lamb had sold [103] fish in the Quadra area.

Q. Last year? In the 1949 season?

A. Yes, in the 1949 and in the 1950 season.

Mr. Baskin: Your Honor, I object to that as hearsay.

Q. You heard that he had been soliciting people, to take bribes, to come out there and fish, hadn't you? A. No, sir, I did not.

Q. Just heard that he had been selling fish?

A. Yes.

Q. And you heard that here in Ketchikan before you went out? A. Yes, sir.

Q. When did you go out to the Boca de Quadra this year? A. On August 12th.

Q. August 12th? A. Yes.

Q. John Lamb had already been out there for some time, had he not? A. Yes, sir.

Q. And is that the same time that Cottrill went out, with you?

(Testimony of Richard E. Warner.)

A. Yes. He accompanied me when we went out.

Q. And did you leave from here on the Chris-Craft, or did you pick up the Chris-Craft out there after you got there?

A. No. We left from the Fish and Wildlife Dock here in Ketchikan.

Q. And proceeded on the Chris-Craft out to the Boca de Quadra [104] area?

A. That is correct.

Q. You of course contacted John Roger Lamb as soon as you got into the area, did you not?

A. Yes. We had groceries for him.

Q. You went over to see him the first day you got in there, on the 12th?

A. We anchored beside him that night.

Q. I see. Did you have any conversations with John Roger Lamb on that time, about August 12th, about, oh, anything that would lead him to believe that you might go along with him on the scheme to sell fish?

A. No. It was mere generalities. I did not know the man at all before we went out there and I got acquainted with him.

Q. But you had sort of thought in your mind, as a good law enforcement officer, that you were going to catch John Roger Lamb if you could, hadn't you?

A. If John Roger Lamb proved himself to be unlawful, then he would be arrested.

Q. That is right. You had that intention when you went out there, did you not?

(Testimony of Richard E. Warner.)

A. Not particularly to arrest him, just if the situation warranted it.

Q. You had talked it over with some of your superiors in the Fish and Wildlife before you left town, had you not? [105] A. That is correct.

Q. And with the United States Attorney's Office?

A. Yes, sir.

Q. And representatives of the Federal Bureau of Investigation? A. Yes, sir.

Q. And so the intention was that if John Roger Lamb proved susceptible to taking a bribe he was to be arrested—trapped, you might say?

A. No, sir; I couldn't say that. I went out there with the intention of patrolling the Quadra area and, if the situation warranted arresting of John Roger Lamb, not on suspicion or anything else, but if he proved himself to be unlawful, then he would be arrested.

Q. And that was understood by your superiors in the Fish and Wildlife Service and by the representatives of the United States Attorney's Office?

A. Yes.

Q. When is the first occasion on which you ever met Joseph C. Patterson? August 14th?

A. The evening of August 14th.

Q. Had you ever heard of Joseph Patterson prior to that time, Richard?

A. I had heard of him; yes.

Q. Ever heard of him as a fisherman?

A. No, I hadn't. [106]

(Testimony of Richard E. Warner.)

Q. In fact he had never fished before this season, had he?

A. I couldn't say that. I am a stranger here.

Q. You had heard of Joe Patterson, but you had never heard of him as a fisherman?

A. That is right. Well, yes; I have heard of a lot of people here in town, but not as fishermen.

Q. Did you even know that Joe Patterson owned a boat up till that time you went aboard?

A. I would hesitate to say on that because, as I say, I found out definitely later on that, and I wouldn't recall for sure when I did first find out about it.

Q. Well, to the best of your recollection on August 14th when you went aboard Joe Patterson's boat that was just a routine thing, wasn't it, to board his boat?

A. Yes. I didn't recognize the boat until we were already there.

Q. At that time you had no suspicion of Joe Patterson, had you, in particular? That is, on August 14th, the first day when you went aboard the boat to look for the doe you told him you wanted to check the icebox?

A. Yes; I checked that boat the same as any other seine boat in the area.

Q. You had no particular suspicion of Joe Patterson in connection with any attempt to bribe Lamb at that time, had you, on August 14th when you went aboard? [107]

(Testimony of Richard E. Warner.)

A. I had heard that the Rolling Wave had committed violations in times past, but I didn't know.

Q. Did you know that the Rolling Wave, that this was August 14th which would have been the day the Rolling Wave fished for anything, did you know that—I mean, while it was owned by Joseph C. Patterson?

A. Would you repeat that? I didn't quite follow you.

Q. The question was whether or not you knew that the Rolling Wave, while it was owned by Joseph C. Patterson, had never fished; Joe had never fished with it? A. I knew nothing like that.

Q. I see. It could be that you had heard of the Rolling Wave being engaged in illegal fishing some other season?

A. No. My suspect of any seine boat would be the same as any other law enforcement officer. It is our duty to check any boat in an area that might have fish in it.

Q. So you were checking the Rolling Wave just the same as any other seine boat coming into the area on that day? A. That is right.

Q. And you told him you were looking for a doe and wanted to look around the boat?

A. No. I said I was making a routine preseason check.

Q. They were friendly, were they not?

A. The skipper allowed me to look over his vessel. I can say that much. He was neither friendly nor extremely gruff. [108]

(Testimony of Richard E. Warner.)

Q. Mr. Patterson himself was friendly, was he not? Do you recall a conversation about his .375 rifle, a .375 Magnum, and he let you take a shot with it; do you recall that, Richard?

A. No, sir; that conversation took place approximately two months later.

Q. Two months later?

A. Yes, or maybe a month and a half. That particular conversation you are referring to there took place entirely after the salmon season was over and after these alleged violations had taken place.

Q. You are sure of that? It didn't occur on this occasion? A. Positively.

Q. Was there anything unusual about the check? Did you find any evidence of any violation of any Fish and Wildlife rules or regulations on August 14th? A. No, I did not.

Q. So you left the boat at that time, and there were no further comments or investigations; is that right? A. That is right; yes.

Q. Now, I believe you said that you and Lamb went aboard the boat on August 15th, again boarded the Rolling Wave; is that right?

A. August 15th was the first time Lamb and I boarded the Rolling Wave together. [109]

Q. And I didn't recall whether you said about what time of day that was that you boarded the boat on the 15th?

A. I believe it was approximately seven-thirty that evening.

Q. Seven-thirty the evening of August 15th?

(Testimony of Richard E. Warner.)

A. Yes.

Q. Had the Rolling Wave been in the area during that day or had they gone out somewhere else? Did you observe the boat there in the area that day?

A. Not specifically. I believe earlier that evening I remember seeing it there.

Q. It came in that evening, did it not?

A. Sometime during the day; I couldn't say when.

Q. And you say that you and Lamb went aboard the boat and had a conversation concerning the fact that you would be cut in on any illegal payments that were made? A. Yes.

Q. And I believe you said that Lamb advised Patterson not to go in and fish that evening because the fish were not schooled up, or words to that effect?

A. Yes; after Mr. Patterson asked him.

Q. Could it be that Lamb said that the reason was that there were too many other boats around?

A. There was—not on that particular night, I don't believe. It could have been; yes.

Q. He could have said that? [110]

A. Yes.

Q. Possibly did, and possibly didn't. Well, now, between August—between the time on August 14th when you went aboard the Rolling Wave and the evening of August 15th when you went aboard the Rolling Wave had you entered into some agreement with John Roger Lamb concerning the taking of illegal fish in Boca de Quadra and splitting of a bribe for that purpose?

(Testimony of Richard E. Warner.)

A. On the evening of August 13th.

Q. August 13th? A. Yes.

Q. That is the day before you boarded the Rolling Wave? A. Yes.

Q. And on the evening of August 13th you and Lamb had arrived at a definite deal; is that right? You had given Lamb to understand that if he made some arrangements you would go along with him?

A. I didn't promise Lamb I would do anything. I didn't want to lead the man on in any way, was my object there.

Q. In other words, Lamb propositioned you as to whether or not you would go along, and you didn't say yes or didn't say no, is that right?

A. That is correct.

Q. But more or less gave him to understand that if he could make such a deal you would go along? Your purpose was to [111] catch him if he went ahead and did it in violation of the law, was it not?

A. That is correct.

Q. So you gave him to understand that if he took this money you would possibly take your share of it to let this illegal fishing occur? A. Yes.

Q. And that was on the evening of August 13th?

A. Yes; August 13th.

Q. Now, you say that on August 16, 1950, John Wendler, Dan Ralston, and was there somebody else aboard the plane? A. Bob Meeks.

Q. Bob Meeks—flew in and landed at, was it the mouth of Mink Arm? A. That is right.

Q. And that you went aboard the plane, or they

(Testimony of Richard E. Warner.)

came aboard your Chris-Craft—I don't know which it was—and you gave John Wendler a full report on what evidence you had to date?

A. Correct.

Q. I believe you said they flew in on that particular date, and Mr. Wendler had advice on this of John Lamb? A. Yes.

Q. And possibly to see whether or not you had found out anything with regard to John Lamb's activities? [112] A. Yes.

Q. That was the purpose?

A. He had other things to do than to check on that.

Q. But his purpose in landing there and talking to you was to talk over the Lamb situation?

A. Yes.

Q. And you did talk over the Lamb situation and you told him at that time that you had made a deal or that Lamb had propositioned you in regard to making a deal on the evening of August 13th?

A. That is right.

Q. Any mention made of Joe Patterson at that time or the Rolling Wave? A. Yes, there was.

Q. What was that?

A. Let's see. This was the morning of the 16th?

Q. I don't know when it was. You said the 16th.

A. Yes. At that time, let's see, Lamb had told me that Patterson had asked or had made arrangements with Lamb to make a set on the 17th if the situation was favorable at that time. And included

(Testimony of Richard E. Warner.)

in my other information to John Wendler was that, I believe.

Q. Included in your information of course would be information concerning your visit to the Rolling Wave on the 15th with Lamb when this conversation was had on that day? [113] A. Yes.

Q. And that was included in your report to John Wendler? A. Yes.

Q. Up to that time the Rolling Wave, so far as you know, had committed no violation of the fishing laws? A. No, not at that time.

Q. There had been no illegal fishing, no illegal set? A. Not so far as I knew.

Q. Or payment of any bribe?

A. Not that I knew of.

Q. As far as you knew?

A. Not that I knew of.

Q. And what did Mr. Wendler tell you; do you recall? Just to go ahead and see what happened; is that about it? A. Yes; to that extent.

Q. Keep your eyes open and see what happened?

A. Yes.

Q. Of course he advised you to let him know immediately if any money changed hands, did he not?

A. No; he did not say that because we had no means of contact.

Q. But it was understood that you would contact him as soon as you had something definite? Did you make any plans for him or any other agents of the Fish and Wildlife Service to observe any illegal sets that might be made?

(Testimony of Richard E. Warner.)

A. There was nothing definite that I knew about at that time. [114]

Q. You didn't know tbout Charles Graham being in the area at that time?

A. Not to observe any illegal fishing; no.

Q. And then on August 19th, I believe you said, you saw John Wendler again?

A. Yes; that is right.

Q. Did he fly into the area on that occasion?

A. Yes, he did.

Q. And you again had a conversation with him about the situation?

A. A very short conversation.

Q. That was on the morning of August 19th, was it, Richard?

A. No. It was on the evening of August 19th.

Q. Well, what time in the evening; do you recall?

A. I believe it was about four-thirty in the afternoon.

Q. Well, at that time you reported to Mr. Wendler that no money had changed hands to your knowledge? A. Yes.

Q. But you of course informed him that an illegal set had been made, or did he tell you that? He knew that there had been illegal fishing by that time, did he not?

A. I told Mr. Wendler that we had evidence to believe that the Rolling Wave had gone in.

Q. Did he indicate that he knew that?

A. Yes. [115]

Q. He told you they had the dope on that? And

(Testimony of Richard E. Warner.)

so then I suppose he told you to wait until the money changed hands and let him know, or words to that effect?

A. Yes—well, no. He said he would contact us to that effect there.

Q. And later that evening Lamb came aboard and tossed down the money, and the split was made?

A. That is right.

Q. Were you Lamb's superior officer, or were you all on more or less the same level as far as your services go?

A. Working down there you mean?

Q. Yes.

A. No. It was a situation where we worked together.

Q. I see. You weren't his commander or superior officer? A. Oh, no; not by any means.

Q. Who would be your immediate superior in the Fish and Wildlife Service?

A. John Wendler.

Q. Do you happen to know what his title is?

A. He is entitled enforcement agent.

Q. Enforcement agent of the Ketchikan area?

A. Yes.

Mr. Kay: That is all.

Mr. Baskin: Just a moment, Richard. [116]

Redirect Examination

By Mr. Baskin:

Q. For the record will you state whether or not Mink Bay is also known as Mink Arm?

(Testimony of Richard E. Warner.)

A. Yes, it is. They are one and the same.

Q. And they are a part of the Boca de Quadra area; is that right? A. Yes.

Q. Now, counsel asked you if at the time you went out there you had in mind possibly arresting John Roger Lamb for a violation of the law. Did you also have in mind investigating and apprehension or leading to the apprehension of any person who gave him money in order to fish in that area?

A. Yes, we did.

Q. In other words, you had a dual purpose to also investigate fishing violations, a possible bribery of a Government official, and to arrest or cause the arrest of these persons; is that correct?

A. That is entirely correct; yes.

Q. And one of those—of the intent to do that was just as equal to catching Mr. Lamb, isn't that correct? A. Yes; definitely so.

Q. Now, counsel asked you about a deal that, I believe he phrased it, that you made with Lamb. Now, isn't it true [117] that you didn't make any kind of deal direct with Lamb regarding any illegal fishing or a bribery of a Federal official, Government officer?

A. It would be much more correct to say that it was not a deal. He approached me, I could say that.

Q. But you didn't encourage him to do that, did you? A. No, I didn't.

Q. Or whatever he said to you with regard to a possible bribery or illegal fishing by other persons,

(Testimony of Richard E. Warner.)

was that his own idea so far as you are concerned?

A. Entirely; yes.

Q. It wasn't your idea to encourage or entice him to make a deal where other persons could fish illegally, was it? A. No.

Q. Or to pay him money and get by with it?

A. No. It was his initiative.

Mr. Baskin: No further examination.

Recross-Examination

By Mr. Kay:

Q. A few questions, Richard. You didn't do anything to give Lamb the idea that you would not go along, did you, Richard? Your idea was to make him think that you were fixed, that you were O.K.?

A. Specifically what I did in that case, when Lamb approached [118] me with something, with some ideas, I deliberately did not encourage him in any way.

Q. I am not suggesting that you did.

A. I realize that. But if he would ask me something I would, you might say, counter it with some questions regarding it so that I did not commit myself in any way to him.

Q. You gave him to understand that it would be O.K., did you not? You certainly didn't inform him that you were going to pinch him if he went ahead and took the bribe, did you, Richard?

A. No. It was to the extent that Lamb had the initiative. Lamb was doing things.

Q. Well, you just let him go ahead and do it,

(Testimony of Richard E. Warner.)

thinking that you were O.K. and would go along?

A. Yes. Lamb made his own assumptions in that case.

Q. And when you were aboard the boat on August 15th with Lamb, aboard the Rolling Wave on August 15th, do you recall you testified, did you not, on direct examination that Joe inquired of Lamb, "Will he be cut in on this?" meaning you, and that Lamb replied, "Yes." Do you remember that?

A. Yes.

Q. And that did occur? A. Yes.

Q. And you didn't make any attempt to discourage the idea in [119] Joe Patterson's mind that you were going along with Lamb?

A. No. Lamb was doing the talking in that case.

Q. And you were just nodding your head, sort of? A. I took it in. I listened.

Q. You did nothing to give Joe Patterson the idea that you were not in the fix, did you. Otherwise it would never have occurred, would it?

A. Would you repeat that last part?

Q. I said you did nothing to give Joe Patterson the idea on August 15th when you were aboard the Rolling Wave with Lamb that you were not in on the fix? You just stood there?

A. Mr. Patterson knew directly that I was a Federal enforcement officer, and what he did was his own idea.

Q. And this conversation in which Patterson asked Lamb if you were in on the fix and Lamb said,

(Testimony of Richard E. Warner.)

"Yes," occurred in your presence on the Rolling Wave, did it not? A. That is right.

Q. You did not at that time inform Joe Patterson that you were not in the fix but you were going to pinch whoever you caught, did you?

A. No, I didn't.

Q. Oh, yes; one other question. I perhaps should have asked this on cross-examination. I overlooked it. About when was it, the best that you can recall, Richard, when you [120] first heard talk about John Roger Lamb having sold fish?

The Court: Never mind answering that question. I am going to have all that testimony as to what this witness heard about the witness Lamb selling fish in Boca de Quadra, stricken, and the jury is instructed to disregard it entirely.

Mr. Kay: May I ask the reason for the Court's ruling in that regard, sir?

The Court: It might have been competent on the trial of Lamb, but not here.

Mr. Kay: Well, isn't it competent in regard to the showing of whether or not Lamb was doing the soliciting to this illegal——

The Court: It is based on hearsay, and furthermore it is entirely out of order. After the defendant or his witnesses have testified, then this witness might be recalled for something of that kind, but at this stage of the trial it is absolutely out of order.

Mr. Kay: Well, but if I had to recall the witness —not to argue with the Court, sir—but if I had to recall the witness, wouldn't I have to make the wit-

(Testimony of Richard E. Warner.)

ness my own on recalling him at some later point in the trial for further cross-examination?

The Court: You would have to make the witness your own; yes; just as is true in the case of establishing any affirmative defense. [121]

Mr. Kay: I think that is sufficient, your Honor.

The Court: Anything further?

Mr. Baskin: No further examination, your Honor.

(Witness excused.)

Whereupon Court recessed for ten minutes, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; whereupon the trial proceeded as follows:

Mr. Kay: Your Honor, may I be heard? I would like to check the Court's attitude in striking the testimony.

The Court: Well, do you think the argument you are about to make is a proper one in the presence of the jury?

Mr. Kay: It will only take a minute, and I am sure there is nothing improper. All I want to say in that regard was that it seems to me that the testimony elicited on cross-examination, that part of the cross-examination, was properly within the scope of cross-examination and within the direct, that it was relevant, competent and material, and in order to show the entire pattern of the entrapment.

The Court: Well, what about it being hearsay, what he heard?

Mr. Kay: I don't see that the hearsay question enters into it because it is testimony that can't be elicited in any other fashion. Certainly proof of a rumor, a suspicion, is sufficient to—in these entrapment cases you will find that [122] they start off with rumor, a suspicion.

The Court: Against the defendant. But not against the witness.

Mr. Kay: But here we have a case based on the theory of entrapment, a double entrapment, as the Government has indicated. Entrapment not only——

The Court: You can't consider the entrapment, if it could be labeled as such, of Lamb. Lamb isn't on trial, and of course it is extremely doubtful—there isn't anything in the evidence that would justify a statement that he also was entrapped.

Mr. Kay: Well, I mean—he was not trapped; he was trapped, but not entrapped, in that the intention evidently originated with him, so far as the other Fish and Wildlife people go, but resulted in the entrapment of the defendant, and the whole scheme resulted in his entrapment.

The Court: Well, now, let's take a look at it this way. Suppose that on your defense you attempted to call a witness who would testify that he heard that the witness Lamb here would take a bribe.

Mr. Kay: It would be relevant, your Honor.

The Court: And it is hearsay, and it is hearsay as it came from the lips of the witness here.

Mr. Kay: I agree with that. If the Court meant only to strike the portion relative to what he heard from [123] other people——

The Court: That is all I have done.

Mr. Kay: I thought you also struck the testimony regarding the conversation with Wendler and plans which were made to go out and go ahead. If you didn't strike that——

The Court: All that was stricken from the consideration of the jury, as the reporter's notes will show, is the witness' testimony as to what he heard concerning Lamb selling fish.

Mr. Kay: I apologize, and for taking the time of the Court.

The Court: Call your next witness.

EUGENE WAYNE COTTRILL

called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination

By Mr. Baskin:

Q. What is your full name?

A. Eugene Wayne Cottrill.

Q. Where do you live, Eugene?

A. I live in Clear Lake, Iowa.

Q. Is that your home? A. Yes, it is.

Q. Are you a student, or something?

A. Yes, I am a student there. [124]

Q. Were you employed during the summer of 1950 in the Territory of Alaska?

A. Yes, I was.

Q. Who were you employed by?

A. Employed by the Fish and Wildlife.

Q. Is that the Fish and Wildlife Service?

(Testimony of Eugene Wayne Cottrill.)

A. Yes; that is right.

Q. And what was your position; what was your title as an employee?

A. I was an enforcement patrolman.

Q. And were you employed for the Fish and Wildlife from about July 6, 1950, to, or through August, 1950? A. That is right.

Q. What area of Alaska did you work while so employed?

A. I was in Boca de Quadra patrolling.

Q. What was the purpose of being in Boca de Quadra?

A. We were—I was there to enforce the game and fishery laws.

Q. And regulations for the conservation of fish?

A. That is right.

A. And game? A. And game.

Q. When did you go to Quadra?

A. We left Ketchikan on August 12th.

Q. 1950? A. 1950. [125]

Q. How did you go out there?

A. We went by Fish and Wildlife patrol boat, the Chris-Craft.

Q. Who do you mean when you say, "We"?

A. Richard Warner and I .

Q. Did both of you work on the Chris-Craft?

A. Yes, we did.

Q. And you arrived at Boca de Quadra about August 12th, 1950? A. That is right.

Q. And from that time on during the commercial fishing season of 1950 did you patrol that area to

(Testimony of Eugene Wayne Cottrill.)

prevent illegal fishing? A. That is correct.

Q. While out there on or about the 12th of August did—strike that question please. On or about the 14th of August, 1950, did you have an occasion to see the vessel Rolling Wave?

A. What date was that?

Q. August 14, 1950?

A. On August 14th, yes, I did.

Q. Where was the vessel?

A. As I remember, it was somewhere between Mink Bay and Kite Island.

Q. And who was with you when you saw it?

A. Richard Warner.

Q. Did you or Richard Warner board the Rolling Wave? [126]

A. Yes. Richard Warner boarded it, and I stayed aboard the Chris-Craft. We were tied up alongside.

Q. Now, on or about the 18th of August, 1950, were you anchored in the vicinity of Cygnet Island near Mink Bay? A. Yes, we were.

Q. Who was there?

A. Richard Warner and I.

Q. And yourself? A. Yes.

Q. Anybody else?

A. John Lamb was there during the day part of the time and during the evening.

Q. And on that evening while you were anchored there, do you know whether or not a boat passed by and went into the area of Mink Bay?

A. We heard a boat proceeding in the direction of Humpback Creek.

(Testimony of Eugene Wayne Cottrill.)

Q. And who was with you when you heard that boat?

A. Richard Warner and John Lamb and I were together on the Chris-Craft.

Q. Did John Lamb say anything?

A. Oh, he just nodded and said, "There he goes."

Q. Did he say who it was?

A. He inferred that it was the Rolling Wave, that is the boat that we were working with or dealing with. [127]

Q. After the boat went by and into Mink Bay did Lamb stay aboard the Chris-Craft?

A. No, he didn't.

Q. What did he do?

A. He left the Chris-Craft shortly after.

Q. Do you know where he went?

A. Yes. He went to the head of Mink Arm to Humpback Creek.

Q. Did you see him any more that evening?

A. No, we didn't. We didn't see him.

Q. When was the next time you saw John Roger Lamb?

A. It was the next morning about the middle of the morning.

Q. Did you talk with him? A. Yes, we did.

Q. What did he say to you?

Mr. Kay: I am going to object to that.

Mr. Baskin: Very well. I will withdraw the question.

Q. Did you see John Roger Lamb on the evening or in the afternoon of the 19th of August, 1950?

(Testimony of Eugene Wayne Cottrill.)

A. In the afternoon?

Q. Yes. A. Yes, we did.

Q. Where were you when you saw him?

A. We were anchored there just off Cygnet Island in Mink Bay.

Q. What were you in or on at the time? [128]

A. We were on the Fish and Wildlife Chris-Craft.

Q. Where was John Lamb when you saw him?

A. Well, he was, I believe he was on the Chris-Craft with us at the time, in his skiff.

Q. Did he reach the Chris-Craft by coming to the Chris-Craft in his skiff or something?

A. Yes.

Q. Did he come aboard the Chris-Craft?

A. Well, this was later in the evening. He came aboard the Chris-Craft later in the evening.

Q. Then he was there twice? Is that what you said? A. Yes.

Q. When was he there the first time?

A. Earlier in the afternoon.

Q. When he came there the first time, did he show you any money?

A. No, he didn't; not the first time.

Q. Did he see you a second time on August 19, 1950? A. Yes, he did.

Q. And with reference to that time, did he show you any money? A. Yes, he did.

Q. Tell the jury, as you remember, just what he did and said there when he came aboard the Chris-Craft.

(Testimony of Eugene Wayne Cottrill.)

A. Well, about, oh, seven-thirty in the evening John Lamb boarded the Chris-Craft and laid a roll of bills on the [129] sink of our Chris-Craft, and he looked at Richard Warner and said, "Go ahead, Skipper, and split it up," and Richard Warner proceeded to divide the money into three separate piles.

Q. How much money did John Roger Lamb put on the table?

A. There was one hundred and eighty dollars.

Q. Did you see Richard Warner count the one hundred and eighty dollars? A. Yes, I did.

Q. What did Warner do with the money?

A. Well, he took our two shares, that would be one hundred and twenty, and he put it in an envelope, an airmail envelope.

Q. Your two shares? Would that be sixty dollars for each of you; is that what it was? A. Yes.

Q. And he put that one hundred and twenty in an envelope? A. Yes.

Q. Did he retain possession of that one hundred and twenty dollars?

A. Yes; he did, throughout the day.

Q. And what did he do with the other sixty dollars? A. Well, John Lamb took that.

Q. Did John Lamb keep that one hundred and sixty dollars? I say, did John Lamb keep that one hundred and sixty dollars?

I mean, sixty dollars? Excuse me. [130]

A. Yes, he did.

Q. Now, after John Lamb took his sixty dollars, did he stay aboard the vessel, or what did he do?

(Testimony of Eugene Wayne Cottrill.)

A. No. He left. Very shortly after that he left.

Mr. Baskin: You may examine the witness.

Cross-Examination

By Mr. Kay:

Q. Eugene, do you remember, or were you aboard the Rolling Wave on August 15th, that would be the day after the first time you went aboard? A. August 15th?

Q. Yes. A. No, I was not.

Q. You weren't aboard on that occasion when Lamb and Warner boarded the boat on the 15th?

A. No, I was not.

Q. Were you ever present on any occasion when, in the presence of Joe Patterson, when Lamb indicated that you and Warner had been fixed to go along on this deal?

A. No. I didn't see Joe Patterson at all out there.

Q. Prior to going out there this season—strike that.

Mr. Kay: That is all the questions. No further questions.

Mr. Baskin: No further examination.

(Witness excused.)

CHARLES EDWARD GRAHAM

called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination

By Mr. Baskin:

Q. What is your full name?

A. Charles Edward Graham.

Q. Where do you live, Charles?

A. Ketchikan.

Q. Were you employed during the summer of 1950? A. Yes, I was.

Q. Who were you employed by?

A. Fish and Wildlife Service.

Q. What—are you still employed by the Fish and Wildlife Service? A. Yes, I am.

Q. And were you employed between from about June, 1950, through August or through September, 1950? [131] A. Yes, I was.

Q. Did you have an occasion, calling your attention to on or about August 17, 1950, did you have an occasion to go to Mink Bay, also known as Mink Arm? A. Yes, I did.

Q. And tell—who went with you?

A. Robert O. Halstead.

Q. Were you at Mink Bay on or about August 18, 1950? A. Yes, I was.

Q. And in what part of that bay were you?

A. I was on the west bank of Humpback Creek.

Q. And does Humpback Creek flow into Mink Bay? A. Yes, it does.

(Testimony of Charles Edward Graham.)

Q. Were you on the beach there or at the edge of the beach? A. Yes.

Q. Who was with you?

A. Robert O. Halstead and John Wendler.

Q. And what were you doing there?

A. We were patrolling the creek for a possible fisheries violation.

Q. On that occasion did you see a vessel?

A. Yes, we did.

Q. In that area? A. Yes.

Q. What vessel was it? [132]

A. The Rolling Wave.

Q. Where was that Rolling Wave? Where did you see it? A. At the mouth of the stream.

Q. Was it within the area closed to commercial fishing?

A. Yes. It was inside the area closed to commercial fishing.

Q. And tell the jury just what the Rolling Wave did. What did it do while it was in that closed area?

A. They proceeded to make a set and had sort of a hard time of it for a while. They became entangled or something. However, they got their net back aboard and started all over again and made a set, completed it, brailed and left.

A. And they completed a set; and did they catch fish? A. Yes, they did.

Q. Now, on that occasion did you hear or see an outboard boat arrive at the scene of that fishing?

A. Yes.

(Testimony of Charles Edward Graham.)

Q. Do you know who it was that was in that outboard boat? A. Yes, I do.

Q. Who was it? A. John Lamb.

Q. And did you hear any conversation between the persons who were aboard the Rolling Wave at the time you saw it fishing illegally there?

A. Yes. I heard a few snatches of conversation. When the set was first started there was some conversation between [133] one man on the boat and one man that was running an outboard motor, hazing the fish.

Q. What was this man doing, hazing the fish? Tell the jury what he was doing.

A. Well, evidently the fish hadn't moved out of the creek far enough. It was not the right stage of the tide or a little bit early, and the fish hadn't moved out to where they could get at them easily, so he was hazing them out by means of an outboard motor and a skiff, driving the fish out into the salt water.

Q. And that was away from the mouth of the stream there; is that right?

A. That is correct.

Q. Now, what boat was that?

A. That was the boat they use for setting seine on the Rolling Wave.

Q. Was that a boat that was removed from the Rolling Wave? A. Yes, it was.

Q. Was it operated by one of the crew members of the Rolling Wave? A. Yes, it was.

(Testimony of Charles Edward Graham.)

Q. While he was up there hazing the fish, driving them back, was anything said to him?

A. Yes. There was a few words spoken to him.

Q. What were they? [134]

A. Somebody on the Rolling Wave called out to him to come back, that they were all fouled up, and the first time that he called the man in the skiff didn't hear the words, so the second time he called a little bit louder and he said, "Come on back, Red. We are all fouled up," and that was all there was.

Q. Did he go back near the Rolling Wave then?

A. Yes. He did then.

Q. And what was the reason for them wanting this person operating this boat to come back to the Rolling Wave?

A. I presume it was because they needed help to clear their seine.

Q. Now, did you hear—do you know that John Roger Lamb came up alongside the Rolling Wave while they were fishing there? Didn't you say that?

A. Yes.

Q. And how long did he stay there?

A. He stayed approximately forty minutes, I should say.

Q. Then did he leave? A. Yes, he did.

Q. Did you recognize any voice that you heard speaking that was on the Rolling Wave?

A. Yes, I did. I recognized one voice from the Rolling Wave.

Q. Who was that?

A. William Cummings. [135]

(Testimony of Charles Edward Graham.)

Q. Was he a member of that crew of the Rolling Wave? A. Yes, he was.

Q. Now, did you hear any conversation relative to Joe Patterson?

A. I couldn't say I heard it relative to Joe Patterson. I heard the name "Joe" used several times.

Q. What was said about "Joe"?

A. Well, as the brailing was going on, as they were taking the fish from the net into the boat, several times one of the crew members, or several of the crew members, cried out to "Hold it. Hold it," or, "Take it slow," or a term similiar to that, and they used "Joe," "Hold it, Joe. Hold it, Joe. Take it slow, Joe."

Q. Mr. Graham, did you have an occasion to see Richard Warner on or about August 20, 1950?

A. Yes.

Q. Where were you when you saw him?

A. I was approximately one mile east of Orca Point in Quadra.

Q. And did you have a conversation with him?

A. Yes, I did.

Q. Did he give you anything while you were there?

A. Pardon me. I made a mistake on that. I was thinking of another time. I saw him at Cygnet Island on August 20th.

Q. Then on the 20th of August, 1950, you saw him at or near Cygnet Island? [136]

A. Yes. I saw him at his anchorage at Cygnet Island.

(Testimony of Charles Edward Graham.)

Q. And did he give you anything at that time?

A. Yes, he did.

Q. What did he give you?

A. He gave me a plain airmail envelope which was sealed, and that was all.

Q. Did he have anything in it?

A. I could tell there was something in it.

Q. Did he tell you whether there was money in it or not? A. Yes, he did.

Q. I show you Plaintiff's Exhibit No. 2 and ask you to state whether or not this envelope is the same envelope or one similar to the one that Richard Warner gave you on or about August 20, 1950?

A. Yes; this is a similar envelope. I couldn't possibly say whether it was the same one.

Q. Did he give you any other envelope on that day? A. He did not.

Q. He didn't give you any other airmail envelope? A. No, sir.

Q. Then what did you do with that envelope that Richard Warner gave you?

A. As soon as he gave it to me I slipped it into my shirt, and when we departed Boca de Quadra I handed that envelope over to Robert Halstead, game management agent. [137]

Q. Did you give Robert Halstead the same envelope that Richard Warner had given you?

A. Yes, I did.

Q. And the contents of it had not been removed?

A. No, they hadn't.

(Testimony of Charles Edward Graham.)

Q. Who is Robert Halstead?

A. Robert Halstead?

Q. Robert Halstead; who is he, and what did he do?

A. Robert Halstead was identified to me as United States Game Management Agent from North Carolina.

Q. In other words, working for the Fish and Wildlife Service along with the other boys?

A. That is right.

Mr. Baskin: You may examine the witness.

Cross-Examination

By Mr. Kay:

Q. Mr. Graham, where was your regular base of operation, or did you have any, during the 1950 season? Where were you regularly stationed?

A. At Ketchikan.

Q. During the fishing season you were stationed at Ketchikan?

A. Oh, I see what you mean. No. Our patrol area extends from the Canadian border north to Rat's Harbor and out to Cape Shakon and also takes in the back entrance to this [138] island that we live on.

Q. You cover that entire area?

A. We try to.

Q. Then you are not a stream watchman or anything like that, located in any particular location?

A. No, I am not.

(Testimony of Charles Edward Graham.)

Q. I don't believe I got your exact position.

A. I am an enforcement patrolman and I am skipper on one of our patrol boats.

Q. And what boat are you skipper of, Mr. Graham? A. Number 7.

Q. And on the night of August 18th did you come into the Boca de Quadra area on Number 7, or how did you get in there, sir?

A. No, I did not. I was already there.

Q. When had you arrived in the Boca de Quadra area? A. On August 17th.

Q. And what did you do when you came into the area on August 17th? Did you let anybody know you were there? A. No, I did not.

Q. Did you see Richard Warner or Eugene Cottrill on August 17th? A. No.

Q. Who was with you when you came into the area on August 17th?

A. Agent Halstead. [139]

Q. Did you have any particular reason for coming into that particular area on August 17th?

A. Yes. My duties were to, while I was there, to patrol Mink Bay stream, which had a large amount of fish in it.

Q. Who had given you that order?

A. Johnny Wendler.

Q. When had you seen Johnny Wendler?

A. I had seen Johnny Wendler on the 16th.

Q. Where did you see Mr. Wendler?

A. On my boat.

Q. He came aboard your boat?

(Testimony of Charles Edward Graham.)

A. Yes, he did.

Q. Did he give you any particular instructions, Mr. Graham, with regard to the evening of August 18th? A. No, he did not.

Q. About what time was it that you were on the bank of Humpback Creek on the night of August 18th?

A. Approximately, the time we arrived was approximately, I should say, about nine o'clock, eight-thirty or nine o'clock.

Q. It was after dark, wasn't it?

A. It was after dark, just shortly after dark.

Q. How did you go in there, on the boat or——

A. I walked.

Q. You walked in? Where did you walk in from? [140]

A. I walked in from Humpback Lake.

Q. How had you gotten into Humpback Lake?

A. Flown.

Q. Who flew you into Humpback Lake?

A. A Coast Guard Gruman airplane.

Q. A Coast Guard Gruman airplane?

A. That is right.

Q. Not a Fish and Wildlife plane? A. No.

Q. And they had picked you up off of your boat?

A. No, they had not.

Q. Well, where did they pick you up?

A. In town, in Ketchikan.

Q. I see. Well, did you come to Ketchikan between August 17th and August 18th then?

(Testimony of Charles Edward Graham.)

A. No, I did not.

Q. When was it that you landed in Humpback Lake and walked down to the creek?

A. The 17th.

Q. Well, are you certain now that it was the 17th or the 18th?

A. Is it permissible to check notes?

Q. Certainly, as far as I am concerned.

A. I flew into Humpback Lake the evening of the 17th at approximately, I should say we got there at sixty-thiry or quarter to seven. [141]

Q. Then this illegal fishing—did you walk over that same evening? A. Yes, we did.

Q. And that is the evening on which you say that you saw the Rolling Wave in the area making a set? A. No, it is not.

Q. You walked over on the evening of the 17th during the night? A. That is right.

Q. And remained there all day on the 18th?

A. No, we did not.

Q. What did you do on the 18th?

A. We went back to the lake again.

Q. Walked over on the evening of the 17th and watched for illegal fishing?

A. That is right.

Q. Did any occur that night?

A. No, it did not.

Q. So you walked back over to the lake and waited until next day and then came back down?

A. That is right.

(Testimony of Charles Edward Graham.)

Q. To the same point? A. That is right.

Q. On Humpback Creek?

A. That is right. [142]

Q. And you had been advised, that it was likely that a particular fish violation would occur on either the evening of the 17th or 18th, by Mr. Wendler, had you not? A. Yes, we had.

Q. And you were in fact put out there in order to observe this particular case of illegal fishing, were you not, by Mr. Wendler?

A. Yes; this particular case or any violation.

Q. Or any violation that might occur on either of those two nights? A. That is right.

Q. But Mr. Wendler informed you that he had reason to believe that a violation might occur?

A. Yes; that is true.

Q. And you were flown into Humpback Lake to give the impression—did they cut off the motor as they landed on Humpback Lake?

A. No, they didn't.

Q. And you walked back in during the night on each occasion; would you? A. Yes.

Mr. Kay: That is all.

Mr. Baskin: No further examination.

(Witness excused.) [143]

ROBERT O. HALSTEAD

called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination

By Mr. Baskin:

Q. What is your name?

A. Robert O. Halstead.

Q. Where do you live, Mr. Halstead?

A. Washington, North Carolina.

Q. Who are you employed by?

A. The United States Fish and Wildlife Service.

Q. And what is your position with the Fish and Wildlife Service?

A. U. S. Game Management Agent.

Q. And in the State of North Carolina?

A. Well, that is right.

Q. And did you work for the Fish and Wildlife, you were employed by the Fish and Wildlife Service during the summer of 1950, were you not?

A. Yes, sir.

Q. And where did you work during the summer of 1950?

A. Alaska; southeastern part of Alaska. Headquarters at Ketchikan.

Q. What time did you arrive in Alaska?

A. July 30th.

Q. 1950? [144] A. That is right.

Q. And then did you work as Fish and Wildlife agent through the month of August, 1950?

A. I did.

(Testimony of Robert O. Halstead.)

Q. And that is in Southeast Alaska?

A. Yes, sir.

Q. Calling your attention to the date of August 18, 1950, tell the jury where you were?

A. On August 18th I was at Boca de Quadra, walked down the trail that leads to Mink Bay along Humpback Creek. We arrived at——

Q. Just a minute now. You went from—did you go from Humpback Lake down to the beach on Mink Bay? A. Yes, sir.

Q. And did you see a fishing vessel within the area closed to commercial fishing and Mink Bay on that day? A. I did.

Q. What vessel was it?

A. I could not see the name on the vessel that was fishing on the night of the 18th.

Q. Do you know what vessel it was?

A. No; not by name. It was a gray seine boat.

Q. What did that vessel do?

A. It made a set in the mouth of Humpback Creek, some distance off from the mouth of the creek but just opposite it. [145]

Q. Now, what do you mean when you say, "It made a set"?

A. It put out a fishing net and pursed it up. It is called a set, I think, in fishing language.

Q. Did you see a boat off of that vessel running around near the mouth of Humpback Creek?

A. I did.

Q. How long did that boat move around near the mouth of Humpback Creek?

(Testimony of Robert O. Halstead.)

A. I would say ten minutes, approximately.

Q. Did you hear any conversation during the time that boat was moving around near the mouth of the creek?

A. Yes, sir. The conversation I heard was, "Hey, Red, come here. Hey, Red, come here. We are all fouled up."

Q. On that same occasion could you see whether or not, or would you know whether or not the net, or the seine net, of that vessel was fouled up?

A. It looked from where I was as though it was fouled up.

Q. And did they get it untangled?

A. Yes, sir.

Q. At that time did you see another boat come alongside the vessel that was there fishing?

A. A few minutes later another boat came alongside.

Q. Do you know who was in that boat?

A. From the sound of the voice and the way it looked I recognized the voice as that of John [146] Lamb.

Q. And was he an agent of the Fish and Wildlife Service at the time? A. Yes, sir.

Q. How long did he stay there?

A. I would say approximately forty minutes.

Q. What did he do while he was there?

A. Well, he tied alongside the boat, and the way the shadows were I couldn't see too much as to what he did.

Q. What did he do after about forty minutes?

(Testimony of Robert O. Halstead.)

A. He proceeded back towards Cygnet Island.

Q. Did they complete a set there?

A. Yes, sir; I believe there was a set completed.

Q. And did you see them brail fish?

A. Well, I could not observe all the brailing, but I could hear the conversation and hear the way the lines were slipping and all that. I believe they were brailing.

Q. Did you hear the name "Joe" mentioned while they were brailing?

A. Yes, sir. At several intervals somebody would holler, "Hold it, Joe. Hold it, Joe."

Q. Now, on or about August 20, 1950, did you have an occasion to see Charles Graham?

A. What date is that?

Q. August 20, 1950?

A. Charles Graham; yes, sir. [147]

Q. Did he give you anything? A. Yes, sir.

Q. What did he give you?

A. He gave me an envelope, and at about seven-thirty or quarter to eight.

Q. Is that p.m.? A. P.M.; yes, sir.

Q. And did that envelope contain something?

A. Yes, sir.

Q. Did he give you more than one envelope?

A. No, sir. He gave me one.

Q. Did he tell you what was in the envelope?

A. Yes, sir; what he thought was in it.

Q. What did he say?

A. He said there was money in that, that we were to bring it to Ketchikan.

(Testimony of Robert O. Halstead.)

Q. I show you Plaintiff's Exhibit No. 2 and ask you to examine it and state whether or not that is the same or a similar envelope that was given you by Charles Graham on August 20, 1950?

A. That is the same or similar, but it did not have any writing on it at that time.

Q. This writing here, serial numbers, etc., has been put on since you saw it; is that right?

A. Yes, sir. [148]

Mr. Baskin: I think the record will show that the Clerk of the Court has placed them on there.

The Court: I don't think there is any dispute over that phase of the case anyhow.

Q. Did you at any time examine the contents of this envelope? A. Not that day; no, sir.

Q. When did you examine it?

A. On August 21st.

Q. Where were you when you examined it?

A. In the District Attorney's Office.

Q. In Ketchikan, Alaska? A. Yes, sir.

Q. And did you find that it contained twenty, I mean contained six twenty-dollar bills?

A. Yes, sir.

Mr. Baskin: You may examine the witness.

Cross-Examination

By Mr. Kay:

Q. When did you first go into the Boca de Quadra area there, Mr. Halstead?

A. When did I first go into the area?

(Testimony of Robert O. Halstead.)

Q. Yes. A. On the 17th?

Q. August 17th? [149]

A. Yes, sir. Late in the evening, I would say about seven p.m.

Q. And how did you get into the area at that time?

A. By the United States Coast Guard plane.

Q. Flew in from Ketchikan? A. Yes.

Q. Now, had you been in the Boca de Quadra area on the boat previously that summer?

A. Yes, I had.

Q. A few days previously or some time?

A. A few days previously.

Q. And then had come into town and then gone back out there on the Coast Guard plane on the evening of the 17th? A. That is right.

Q. And where did the plane land you on that occasion? Humpback Lake?

A. Humpback Lake.

Q. Now, you walked down and observed the Mink Arm area on the evening of August 17th?

A. Yes, sir.

Q. And went back over to Humpback Lake and then back down again the next evening; is that right? A. That is right.

Q. When you were in Ketchikan before you went out there on the Coast Guard plane, you were instructed by Mr. Wendler [150] that a possible violation might occur there at that particular point?

A. That is right.

(Testimony of Robert O. Halstead.)

Q. And you had been sent out by Mr. Wendler to observe that particular operation, had you not?

A. That is right.

Mr. Kay: That is all.

Mr. Baskin: No further examination.

(Witness excused.)

JOHN D. WENDLER

called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination

By Mr. Baskin:

Q. What is your full name?

A. John D. Wendler.

Q. What agency are you employed by?

A. The Fish and Wildlife Service.

Q. And what is your position with the Fish and Wildlife Service?

A. Enforcement Agent.

Q. Where are you stationed?

A. Ketchikan, Alaska.

Q. How long have you been enforcement agent?

A. During the last two years. [151]

Q. Calling your attention to August 18, 1950, where were you on that day, on or about that day?

A. I was at Mink Arm.

Q. And what were you doing there?

A. We were investigating a possible fishery violation and bribery violation.

(Testimony of John D. Wendler.)

Q. Where were you on Mink Arm?

A. Right at the mouth of Humpback Creek.

Q. Did you have an occasion to see a fishing vessel within the, in the waters closed to commercial fishing in that area? A. I did.

Q. Who was with you at the time?

A. United States Game Management Agent Robert Halstead and Enforcement Patrolman Charlie Graham.

Q. What vessel did you see in that area?

A. The Rolling Wave.

Q. At the time. What did the Rolling Wave do?

A. Well, the Rolling Wave entered the area about eleven-fifteen p.m., and at eleven-twenty-five they started to make a set.

Q. Well, what did they do there?

A. They let their seine go.

Q. Did they complete a set?

A. No. They snagged up. We couldn't tell exactly what they [152] snagged up on.

Q. And tell whether or not you saw a boat off of the Rolling Wave running around up near the mouth of Humpback Creek. A. I did.

Q. Was that a boat off of the Rolling Wave?

A. It was.

Q. And was it piloted by a crew member of the Rolling Wave? A. It was.

Q. And what was it doing?

A. It was driving the fish out of the stream mouth over toward where they were making the set.

(Testimony of John D. Wendler.)

Q. Over toward the net that they had out in the water? A. That is right.

Q. Then did you see another boat approach the Rolling Wave during that illegal fishing operation?

A. I did.

Q. What boat was that?

A. That was Stream Guard Lamb's boat.

Q. Who was piloting that boat?

A. John Lamb.

Q. Was he an agent of the Fish and Wildlife Service at the time? A. He was.

Q. And how long did he stay there?

A. Approximately forty minutes. [153]

Q. What did he do while he was there?

A. Well, the first thing he did he yelled out, "How did you become all fouled up?" We could hear that, and I could identify it as John Lamb.

Q. Well, what did he do in the way of the operation, in the making of that set; anything?

A. We couldn't tell exactly what he was doing. He was helping them clean the net, or something.

Q. And how long was he there?

A. Forty minutes.

Q. What did he do after the forty minutes was up?

A. He proceeded back towards the entrance of Mink Bay.

Q. Did the fishing vessel Rolling Wave complete a set there and brail fish?

A. Later on during the evening.

(Testimony of John D. Wendler.)

Q. That same evening?

A. The morning of the 19th.

Q. Now, calling your attention to about August 12, 1950, did you cash a check for John Roger Lamb? A. I did.

Q. How much was that check?

A. It was approximately three hundred and ninety dollars.

Q. Did you pay any bills at Lamb's request out of that three hundred and ninety dollars?

A. I did. [154]

Q. Tell the jury what bills you paid out of it.

A. Well, I paid one bill to Harry Kates for eighty-five dollars, and I went to the Marine Hardware, I believe it was, and purchased an outboard wheel and two spare plugs for about five seventy-five, or just about that much.

Q. Did he give you money for a fishing license for himself or his wife? A. He did.

Q. About how much was that?

A. Five dollars.

Q. About how much money was returned to John Lamb out of that money?

A. The remaining part, about three hundred dollars.

Q. Then in round numbers it was right close to around three hundred dollars; is that right?

A. That is right.

Mr. Baskin: You may examine the witness. Oh, excuse me. I would like to ask him a few other questions if it pleases the Court.

(Testimony of John D. Wendler.)

Q. Mr. Wendler, was John Roger Lamb employed as a Fish and Wildlife agent?

A. Yes, sir.

Q. What was his title?

A. Deputy enforcement agent.

Q. That is O.K. Now, then, tell the jury what his duties [155] were as such?

A. He had the same duties as any enforcement agent of the Fish and Wildlife Service, which was mainly to enforce all laws and regulations and arrest anyone caught in a violation and to prevent any illegal operation whatever in the area.

Q. That is any illegal fishing, he was to prevent any illegal fishing or prevent any violations of the laws and regulations concerning the conservation of fish in Alaska? A. That is right.

Q. And was he so instructed by you?

A. He was.

Q. Tell the jury whether or not he was instructed to report to you any violations of the Fish and Wildlife, any violations of the laws and regulations of the Fish and Wildlife—I mean, any laws and regulations conserving fisheries in Alaska?

A. That is correct.

Mr. Baskin: You may examine the witness.

Cross-Examination

By Mr. Kay:

Q. John Roger Lamb was duly appointed as a Fish and Wildlife agent, was he not, on June 7, 1950? A. That is correct. [156]

(Testimony of John D. Wendler.)

Q. And remained as such down to August 22, 1950, did he not? A. That is correct.

Q. At all times between June 7th and August 20, 1950, John Roger Lamb was a duly authorized deputy enforcement agent of the Fish and Wildlife Service of the United States Government? Right?

A. That is correct.

Q. Prior to August 18, 1950, Mr. Wendler, have you had reason to suspect that John Roger Lamb was selling fish illegally or taking bribes as a law enforcement officer? A. I did.

Q. Will you state to the jury how long prior to August 18th?

Mr. Baskin: Your Honor, I object to that. That is immaterial, how long before.

Mr. Kay: I think it is very relevant as to when the plan began, your Honor.

Mr. Baskin: Not as to how long he understood it. It has nothing to do with it.

The Court: Will you repeat the question?

Court Reporter:

> "Q. Prior to August 18, 1950, Mr. Wendler, have you had reason to suspect that John Roger Lamb was selling fish illegally or taking bribes as a law enforcement officer? A. I did.
>
> "Q. Will you state to the jury how long prior to August 18th?"

The Court: How is that—— [157]

Mr. Baskin: I misunderstood the question, your Honor. I am sorry. I will withdraw the objection,

(Testimony of John D. Wendler.)

as it is now framed. I thought he said another date.

The Court: Very well.

A. Since August 9, 1950.

Q. And on August 9th, you at all times after August 9th, then you had reason to suspect that John Roger Lamb was permitting illegal fishing in that area? A. I did.

Q. And did you after August 9th then, Mr. Wendler, in accordance with your duties make preparations to attempt to catch John Roger Lamb in the act of permitting illegal fishing?

A. Yes.

Q. Or accepting bribes? A. I did.

Q. And that involved the sending of Agent Robert Halstead and Agent Charlie Graham out to the area on, out to Humpback Lake on August 17th in a Coast Guard plane? A. That is correct.

Q. Did you accompany them on that plane on that night? A. I did not.

Q. You came in later, or were you already there?

A. I was not there.

Q. You were not one of the gentlemen walking down from [158] Humpback Lake on August 18th?

A. On August 18th, but not the 17th.

Q. Did you come into the area on August 18th; Humpback Lake, that is? A. I did.

Q. Flew in? A. I did.

Q. And what kind of plane took you?

A. Fish and Wildlife Service plane, Widgeon 743.

(Testimony of John D. Wendler.)

Q. That plane landed there, let you off, and you joined Agents Halstead and Graham who were already there; is that correct, sir?

A. That is correct. But that is not the number of the plane. I don't know the number of the plane.

Q. Well, it is completely immaterial, I assure you. And prior to that time you had also instructed Richard Warner, employed by the Fish and Wildlife as enforcement patrolman—you had received a report from Richard Warner on about August 15th, had you not? A. I did.

Q. Was it—I am sorry—was that August 15th or August 16th that you received the report from Warner?

A. I believe it was earlier than that.

Q. You had received a report from him earlier with regard to the situation than August [159] 16th? A. I did.

Q. You had a conversation with Richard Warner on August 16th, did you not, in which you, Dan Ralston and Bob Meeks were present?

A. I did.

Q. And at that time Richard Warner advised you, did he not, of the fact that he and John Roger Lamb had gone aboard the boat Rolling Wave on August 15th, the day previously?

A. Will you state that again?

Q. Did Richard Warner tell you on that occasion that he and Lamb had gone aboard the Rolling Wave on August 15th?

(Testimony of John D. Wendler.)

A. I don't remember that.

Q. Well, did he tell you that he and John Roger Lamb had had a discussion or conversation with anyone on the Rolling Wave?

A. That is correct.

Q. And he informed you what the gist of that conversation was? A. That is correct.

Q. Now, you had advised Richard Warner, had you not, Mr. Wendler, that he was to go along and not entice John Roger Lamb, but at the same time try to catch him in the act of accepting a bribe, had you not? A. That is correct.

Q. And prior to this conversation now, on August the 16th with you, Dan Ralston, Bob Meeks and Richard Warner were [160] present, had you received any report from Richard Warner with regard to any possible violations by the Rolling Wave? A. I did.

Q. When was that report received from Richard Warner? A. August 13th.

Q. On August 13th? August 13th, now where did that occur, Mr. Wendler?

A. I believe I stopped in on the plane and picked it up.

Q. You stopped in on the plane. Where do you mean by "stopped in"? A. Orca Point.

Q. At the anchorage at Orca Point? And on that day Richard Warner handed you a report, or was it an oral report?

A. It was a written report.

Q. And it is your testimony, sir, that that writ-

(Testimony of John D. Wendler.)

ten report contained a reference to a possible violation by the Rolling Wave?

A. That is correct.

Q. Did that report say that John Roger Lamb had on that date or at some time prior to August 13th made a deal with anyone on the Rolling Wave to engage in illegal fishing out there?

A. That is correct.

Q. I see. Warner stated in this written report that Lamb had [161] told him that he had made a deal with the Rolling Wave; is that correct, or in substance correct? A. That is correct.

Q. And that report is dated August 13, 1950?

A. I don't believe it is dated that date, but that is the date I received it.

Q. It may have been written the day previous or something like that, but it was received by you on August 13th? A. That is correct.

Q. Prior to August 13th, 1950, when you received this report from Richard Warner, mentioning the Rolling Wave, had you received any previous reports of any possible violations by the Rolling Wave? A. I have.

Q. When did you receive such a report?

A. August 9th.

Q. On August 9th. Was that a report from Richard Warner? A. That is correct.

Q. And in that report—was that a written report on August 9th? A. No, sir.

Q. Oral report; is that correct?

(Testimony of John D. Wendler.)

A. That is correct.

Q. And at that time did John, I mean did Richard Warner state to you in substance that he believed that John Roger Lamb [162] had made some deal with the Rolling Wave with regard to illegal fishing?

Mr. Baskin: Your Honor, I object to that. It is hearsay.

The Court: Well, I am just wondering about the relevancy of this anyhow.

Mr. Kay: Well, it is certainly relevant, sir, tending to reflect on the story told by the chief witness for the prosecution, John Roger Lamb, who said that no discussion had ever taken place prior to August 14th, 1950.

Mr. Baskin: Well, your Honor, that isn't what this witness is testifying to anyway. He is testifying to pure hearsay, and it is irrelevant and immaterial, and I will object to it.

Mr. Kay: It seems to me it certainly is impeaching.

Mr. Baskin: He asked him as to the contents of a report that Warner made.

The Court: It seems to me it is subject to the same infirmity as the testimony stricken. It is hearsay. Objection sustained.

Mr. Kay: May I be heard, your Honor? Here we have testimony by one witness for the Government who testifies that the Rolling Wave——

Mr. Baskin: Well, your Honor, if he is going to

(Testimony of John D. Wendler.)

argue it, I think the jury ought to be excused. [163]

Mr. Kay: I would certainly like to argue it.

The Court: Well, the jury may be excused for the day anyhow.

Mr. Baskin: Well, why don't we finish this witness before we complete the day? Apparently he doesn't have much more to ask the witness.

The Court: Apparently he can't finish without a ruling on this thing.

Mr. Kay: If that testimony is left in, that is all I need out of this witness with the possible exception of this question——

Mr. Baskin: I won't move that the jury be excluded then at this time, your Honor.

Mr. Kay: I was going to ask another question.

The Court: Well, but the objection has been ruled on, and you wanted to argue it.

Mr. Kay: Well, all right. I have only one more question of the witness.

The Court: Doesn't the asking of that question depend on the Court's ruling on this?

Mr. Kay: Yes. I was going to ask him where John Roger Lamb, I mean where Richard Warner told him he got the information, if it was John Roger Lamb.

The Court: Well, that would again be hearsay, and I suppose it would be objected to as [164] hearsay.

Mr. Baskin: Yes, it will, your Honor.

The Court: Will that finish your examination?

Mr. Kay: May I point this out, your Honor? Well, I don't want to argue in the presence of the

(Testimony of John D. Wendler.)

jury. That would complete my examination, that is true. He could answer the question and, if it is to be stricken, it could be stricken along with the rest of it.

Mr. Baskin: I am going to object to it before he asks it.

The Court: Well, the damage in the view of the District Attorney would have been done. Do you have any further redirect examination?

Mr. Baskin: Yes, I do, your Honor.

Redirect-Examination

By Mr. Baskin:

Q. John, you mentioned that you contemplated and asked, I believe, Warner to make, to investigate a possible violation, an illegal fishing, and also catching of Lamb in a possible bribery or an illegal fishing. Now, then, did you also instruct him to investigate and inquire into the circumstances of any person who might fish in that area illegally?

A. I did.

Q. And to inquire and investigate into [165] the circumstances of any person who might bribe or give money to John Roger Lamb for the purpose of permitting them to fish in that area in the closed area? A. I did.

Q. The counsel asked you with regard to that report that Warner referred to you and, I believe, he mentioned the deal that Lamb made with the Rolling Wave to fish illegally. Now, wasn't the substance of that report to the effect that the Roll-

(Testimony of John D. Wendler.)

ing Wave had made, was going to fish in the closed waters of Mink Arm or Boca de Quadra and fish illegally? A. That is correct.

Mr. Kay: Do I understand that the United States Attorney is now examining about hearsay evidence which your Honor has ruled be excluded?

The Court: Hearsay evidence has got to be objected to before the Court can exclude it, otherwise it goes in for the consideration of the jury.

Mr. Kay: I thought the Court instructed on hearsay on its own motion. Am I correct in that?

The Court: No; on the objection of the United States Attorney. The Court never strikes hearsay evidence unless counsel object to it because hearsay evidence may be considered by the jury, in the absence of objection, for what it is worth. [166]

Mr. Baskin: No further examination.

(Witness excused)

Mr. Baskin: If the Court please, I think this would be a good time to recess.

The Court: Were you through?

Mr. Kay: I am through.

The Court: Ladies and gentlemen of the jury——

Mr. Kay: Pardon me. I would like to have each of these witnesses, I presume they will be, particularly Warner and Wendler, available during the trial.

The Court: No difficulty about that?

Mr. Baskin: They will be here.

The Court: They should be here in view of the announcement of counsel.

Whereupon the jury was duly admonished and Court adjourned until 10:00 o'clock a.m., October 24, 1950, reconvening as per adjournment, with all parties present as heretofore, and the jury all present in the box; whereupon the trial proceeded as follows:

The Court: Call your next witness.

JULIA ELLEN LAMB

called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination

By Mr. Baskin:

Q. What is your full name? [167]

A. Julia Ellen Lamb.

Q. Are you the wife of John Roger Lamb?

A. I am.

Q. Mrs. Lamb, where were you living during August, 1950?

A. On the boat at Boca de Quadra.

Q. Calling your attention to August 19th, on or about August 19, 1950, did your husband show you anything? A. Yes, he did.

Q. What did he show you?

A. He showed me sixty dollars in money that he was supposed to have received from Joe Patterson.

Q. And he told you where he got it?

A. He did.

Q. And where did he, who did he get it from?

(Testimony of Julia Ellen Lamb)

A. He said he received it from Joe Patterson.

Q. Now, calling your attention to August, on or about August 21, 1950, did he show you anything?

A. He showed me some money he received that time.

Q. How much money did he show you?

A. One hundred dollars.

Q. And did he tell you where he got it?

A. Yes. He said he received it from Joe Patterson.

Mr. Baskin: You may examine the witness.

Mr. Kay: No questions.

(Witness excused) [168]

KENNETH P. SAMPSON

called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination

By Mr. Baskin:

Q. What is your full name?

A. Kenneth P. Sampson.

Q. What is your occupation or employment, Mr. Sampson?

A. Deputy U. S. Marshal at Ketchikan, Alaska.

Q. How long have you been a Deputy U. S. Marshal? A. Approximately——

Q. At Ketchikan?

A. Approximately five years, in Ketchikan.

Q. Mr. Sampson, state whether or not on or

(Testimony of Kenneth P. Sampson)

about August 22, 1950, you arrested John Roger Lamb? A. I did.

Q. And at the time of the arrest tell the jury how much money he had in or on his possession?

A. He had six hundred and seventy dollars and ninety-two cents.

Mr. Baskin: You may examine the witness.

Mr. Kay: No questions.

(Witness excused)

Mr. Baskin: The Government rests, your Honor.

The Court: Are you ready to go on?

Mr. Kay: At this time, your Honor, I would like to [169] make a motion and be heard on it very briefly out of the presence of the jury.

The Court: The jury may retire until called.

Whereupon the jury retired from the courtroom.

The Court: You may make your motion.

Mr. Kay: At this time I would like to move the Court for a judgment of acquittal.

Whereupon argument on the motion was presented by Mr. Kay.

The Court: The witness Lamb testified to the contrary, and of course the evidence for the Government on a motion of this kind must be viewed in the most favorable light with all the inferences that are reasonable to be drawn therefrom, so the motion will have to be denied. Call the jury.

Whereupon the jury returned and all took their places in the jury box.

The Court: Call your first witness.

Defendant's Case

JOSEPH C. PATTERSON

called as a witness on his own behalf, being first duly sworn, testified as follows:

Direct Examination

By Mr. Kay:

Q. Will you state your name please, sir? [170]

A. Joseph C. Patterson.

Q. And where do you live, Mr. Patterson?

A. Ketchikan.

Q. About how long have you been here in Ketchikan, sir? A. Approximately three years.

Q. And where did you live before you came to Ketchikan? A. San Diego, California.

Q. Married and live here in Ketchikan?

A. Yes.

Mr. Baskin: I object, your Honor.

Mr. Bailey: It is irrelevant and incompetent.

Mr. Baskin: Calling for sympathy of the jury.

Mr. Bailey: What difference does it make if he is married?

Mr. Kay: The purpose is obvious, your Honor. It seems to me that it would give the jury a reasonable speaking acquaintance with the defendant. I don't know that there is anything prejudicial about a man being married. There may be some people on the jury who don't approve of marriage.

The Court: Well, nevertheless, it is an irrelevant matter and one that might elicit the sympathy of the

(Testimony of Joseph C. Patterson)

jury. It is just not competent evidence that is all. Objection sustained.

Q. Are you engaged in any business, Mr. [171] Patterson; in Ketichikan, Joe?

A. Yes. I have operated the 400 Club since I have been here and Ed and Joe's Pool Hall.

Q. And also have you engaged in any other occupation, sir?

A. I have engaged in fishing.

Q. Now, are you the owner or the part owner of any fishing vessel here in the City of Ketchikan?

A. I own the Rolling Wave, part owner, half owner.

Q. Who is the other part owner of that vessel?

A. Bill Tatsuda.

Q. When did you and Bill Tatsuda acquire the Rolling Wave, Joe?

A. In September of 1949, I believe.

Q. And have you owned the Rolling Wave ever since that time? A. Yes.

Q. Now, are you acquainted with John Roger Lamb who testified yesterday in this case?

A. Yes.

Q. How long have you known John Roger Lamb, Joe?

A. I have met him about three years ago, but I didn't become acquainted with him until this past, you might say, June or July.

Q. Prior to June or July—is that of 1950, Joe?

A. 1950.

(Testimony of Joseph C. Patterson)

Q. Now, prior to that time did you have anything more than a casual acquaintance with [172] John Lamb?

A. Nothing but a casual acquaintance.

Q. Now, have you ever had any conversations with John Lamb concerning fishing in the general area of Boca de Quadra? A. Yes.

Q. Do you recall approximately the first occasion on which you had such a conversation with John Lamb?

A. Approximately—after the testimony yesterday——

Mr. Baskin: Your Honor, I object to that. He should answer the question, not referring to any testimony previously testified to.

Mr. Kay: I am refreshing his recollection, your Honor, that is all.

Mr. Baskin: Well, he can refresh his recollection only by circumstances that he knows, not by what some witness has testified here on the witness stand.

Mr. Kay: He can refresh it by anything.

The Court: Well, I am inclined to think it can be refreshed by anything also, but I am wondering whether you have in mind asking him an impeaching question now.

Mr. Kay: Not at this point, no, your Honor. I was just trying to get a general identification as to the date of the first conversation that he recalls, if he recalls it, with John Lamb concerning fishing in the general area of Boca de Quadra.

(Testimony of Joseph C. Patterson)

The Court: Objection overruled. You [173] may proceed.

Q. Can you state, Joe, about when that would be? A. Sometime in June.

Q. Well, now, do you know whether it was the early part of June or latter part of June or middle of June; have you got any idea in that regard?

A. I would say the early part of June.

Q. Do you recall where that conversation took place?

A. At the back of Jimmy Tatsuda's grocery store.

Q. Who else was present at that time if you recall?

A. Bill Tatsuda, and Jimmy Tatsuda saw us talking in the back of the store.

Q. Now, how did it happen that you got into the conversation with John Lamb and Bill Tatsuda on that occasion?

A. John Lamb and Bill Tatsuda were talking in the back of the store, and I came in, and Bill Tatsuda hollered at me, "Come back, Joe, I want to see you a minute," so I walked back to the back of the store.

Q. To the best of your recollection, Joe, will you tell the jury in your own words what was said by John Roger Lamb, by Bill Tatsuda, and by yourself in that conversation, to the best of your recollection?

Mr. Baskin: Your Honor, I want to know if this is an impeaching question or if this is examination

(Testimony of Joseph C. Patterson)
establishing his case. If it is impeachng, he hasn't established the date and time on which this conversation took place, and that is essential [174] to impeach John Roger Lamb.

Mr. Kay: It is not an impeaching question. If it had been an impeaching question, I would have asked that exactly.

The Court: It is not impeaching in form of course. It falls far short of being impeaching.

Mr. Kay: It may result in impeaching the testimony of John Roger Lamb, but that is not necessarily impeachment, contradictory testimony.

The Court: That is the usual result of cross-examination. But so far as impeaching the witness by showing contradictory statements in the way prescribed by the statute of course the question would have to be put in impeaching form. But since you say that this is not such a question, why you may ask it in any way you see fit.

Mr. Kay: I believe I understand. All I am intending at this time is to bring out our case, then at the conclusion or toward the end of Mr. Patterson's testimony I had intended to ask him whether or not on such and such a date or thereabouts and in the presence of so and so and etc. in impeaching form. I asked the reporter——

The Court: You mean you would reiterate what he is about to do now, what he is about to say now? In other words, you have to choose the method, as I see it. If you are going to use the defendant here

(Testimony of Joseph C. Patterson)
as an impeaching witness to impeach the [175] witness Lamb, then of course you would have to put the question in impeaching form but, if you merely want to put in substantive evidence of your own defense, then you can proceed any way you see fit. But under the guise of putting in substantive evidence of the defense of entrapment, you can't cover at the same time what has already been stated to Lamb in the form of an impeaching question, otherwise you are evading the statute.

Mr. Kay: Well, certainly if that substantive evidence put in to support the defense of entrapment should result in a conflict or contradiction between the testimony of our witnesses and the testimony of John Roger Lamb, that would certainly have an impeaching effect although it would not be the technical impeachment which perhaps is required by the statute. If one witness contradicts another, it is for the jury to decide which witness is telling the truth. Am I correct?

The Court: Certainly. But as I said before, all you need to do is to avoid impeaching the witness under the guise of putting in substantive evidence, by showing the exact language used by the witness Lamb. In other words, while you can build up your own defense in any way that you see fit and put in substantive evidence in any way that you see fit, you cannot impeach a witness by showing contradictory statements [176] except in the manner provided by statute.

Mr. Kay: Well, now suppose, your Honor, that

(Testimony of Joseph C. Patterson)
the testimony in response to the question, which is merely to state his recollection of that conversation, contradicts the testimony of John Roger Lamb who, as I recall, testified that no such a conversation occurred; already there is a contradiction as far as that goes.

The Court: Well, my recollection is that you never put a question to the witness Lamb in impeaching form.

Mr. Kay: That is my recollection; except, I will withdraw that, with regard to the testimony of—I think an impeaching question was asked in regard to Rollie Lindsey and perhaps Chester Klingbeil. Now, I have asked the reporter to make a transcript of the evidence of the cross-examination of the witness Lamb. If I had that, I would be prepared to ask such questions as were impeaching in the exact words used. I don't see how it is possible to do that otherwise.

The Court: Well, we should remember the limits now of this rule, and that is this, that it is unfair to impeach a witness by asking questions of the impeaching witness, who is the defendant in this case, that were never asked the witness Lamb, and that is why the statute provides that before you can ask an impeaching question of the impeaching witness you have to ask it in practically the identical words in which the impeaching question was put to [177] the witness sought to be impeached, who is Lamb in this case. Now, it seems to me, that being the purpose of the statute and the limit of it, that you

(Testimony of Joseph C. Patterson)

should govern yourself accordingly. I have confidence in your knowing the limits of this rule and that you certainly have had enough experience with it to know that you won't try to deceive the Court, so you may proceed along that line. But, you can see what would happen if he relates a conversation now that the witness Lamb was never questioned about. Then it would become necessary to recall Lamb. It would never end.

Mr. Kay: I don't see how that could be possible, your Honor, because the witness Lamb denied any conversation took place in the back of the store during June, July or August. Now, if any conversation took place between the three parties specifically named to Lamb, then I think he has a right to say what that conversation was.

The Court: I don't remember what the witness Lamb's testimony was on that. I believe his testimony was that he didn't remember any such conversation.

Mr. Kay: All right; that he didn't remember or didn't recall any.

The Court: But you called his attention to a specific conversation, specific language. Now in order to impeach him on that it seems to me that your question here would have to be limited to that conversation, the language that you used [178] there, otherwise you would be impeaching a witness by showing another conversation or another statement about which the witness Lamb was never questioned.

(Testimony of Joseph C. Patterson)

Mr. Kay: Of course, all I have is my notes on the cross-examination, questions which I intended to ask Lamb, and I don't see any possibility of being mistaken about these conversations because there were only, as far as I know, two or three of them occurred, and I went over every one with Lamb extensively.

The Court: Of course, the only safe course to follow when you are going to put an impeaching question is to have it written out, and then you can put the same question to the impeaching witness.

Mr. Kay: Yes, sir.

The Court: But in this case what we are up against is this. You asked the witness Lamb whether he had certain conversations, and then you are asking this witness to state what conversations he had, and he may go off on some other conversation that the witness Lamb was never asked about and never had any opportunity to deny.

Mr. Kay: I don't see any possibility of that because, as I have said, and you will recall, your Honor, that he said he had only one conversation with Joe Patterson prior to August 14th or 15th and that that was a casual meeting on the street and it consisted of the words, "Hello," "I will be seeing [179] you."

The Court: But didn't you ask him after that whether he had a specific conversation which he said he didn't remember?

Mr. Kay: Yes.

(Testimony of Joseph C. Patterson)

The Court: Now, then, you can't impeach him by showing that he had some other conversation, some other conversation that you never questioned him about.

Mr. Kay: I am not intending to.

The Court: Very well then. You may proceed.

Mr. Kay: Perhaps this discussion should be out of the presence of the jury. I am still not clear as to whether or not the defendant Patterson, who has been asked a question, may answer that question, or whether I am going to be out of order if he relates the conversation not in the exact words used by me in the question to Lamb.

The Court: It wouldn't have to be in the exact words but in substance if it referred to the same conversation and was substantially the same so that there would be no question but that each one had the same conversation in mind.

Mr. Kay: I don't believe that there could be any question about that.

The Court: Well, you may proceed.

Mr. Baskin: Well, your Honor, there obviously is a question so far as the impeachment goes, and I am going to [180] continue my objection.

The Court: Well, you will have to object on some specific ground. What is it?

Mr. Baskin: I am going to object so far as that last question that was asked the witness that he has not placed the question in the proper form as re-

(Testimony of Joseph C. Patterson)
quired by statute to impeach the witness John Roger Lamb.

The Court: Will you repeat the question?

Court Reporter: Q. "To the best of your recollection, Joe, will you tell the jury in your own words what was said by John Roger Lamb, by Bill Tatsuda, and by yourself in that conversation, to the best of your recollection?"

The Court: Isn't that the conversation that the witness Lamb said he had no recollection of?

Mr. Kay: Yes, sir.

The Court: Did you relate the conversation to the witness Lamb in your question to him?

Mr. Kay: Yes, sir.

The Court: Then you have to relate it the same way to this witness.

Mr. Kay: I suppose then there will be an objection that it is a leading question.

The Court: No. An impeaching question is always leading in form. In other words, the form of it would be this—did not the witness Lamb at such and such a time and place [181] and certain persons being present say so and so in response to question so and so.

Mr. Kay: Well, let's see if I can recall the question proposed to the witness Lamb with regard to that conversation.

The Court: As I say, that is the difficulty, as I see it, here, that no question should ever be attempted to be put to an impeaching witness unless it is first written out, and repeated at the time that it is put to the witness sought to be impeached.

(Testimony of Joseph C. Patterson)

Mr. Kay: But, your Honor, to me this is not an impeaching question at all. I am putting in my substantive case, defense of impeachment, the question being—did you have a conversation with John Roger Lamb on or about June 7th.

The Court: That would be perfectly proper as substantive evidence in support of your defense except that it also here now in this situation tends to serve another purpose and that is to impeach Lamb in a manner prohibited by the statute. Now, for instance, you asked Lamb whether he had such and such a conversation in Tatsuda's store. He said, "I have no recollection of it." Then you put the defendant on the stand, and you don't ask him whether that precise conversation took place, but you ask him what conversation took place, and he may relate something entirely different that was never called to the attention of Lamb. Now, that is the vice in such [182] a procedure.

Mr. Kay: If that occurs, certainly Lamb could be called as a witness in rebuttal.

The Court: Yes; but that is just what the statute is intended to avoid, otherwise the first thing you know you have disorder and confusion; you have to recall and recall.

Mr. Kay: Precisely, if the purpose of this question was to impeach; but I am merely eliciting from my own witness his story as to the events leading up to his going out to the Boca de Quadra.

The Court: But the United States Attorney takes the view, and it is not an unreasonable one,

(Testimony of Joseph C. Patterson)
that by going about it this way you circumvent the statute and accomplish the impeachment of the witness Lamb in a way not permitted. Now, if you want to recall the witness Lamb and put an impeaching question to him as provided by statute, the Court will permit you to do so, but at the present time——

Mr. Kay: Perhaps that would be the most appropriate manner.

The Court: It would be the most orderly way of proceeding, and it would comply with the statute and remove all objection.

Mr. Kay: All right. I will ask permission at this time then to withdraw the witness Patterson, to take a ten minutes' recess while I prepare an impeaching question or two [183] or three, and then proceed with the case.

The Court: Very well.

Mr. Kay: I would like to have Mr. Lamb here in about ten minutes.

Mr. Baskin: Well, your Honor, he has closed his case—I mean we have rested, and Lamb was a Government witness and——

The Court: Well, that is true, but it is within the discretion of the Court to reopen the case, and I think that in the furtherance of justice we will permit this. So, Court will be recessed for ten minutes.

Whereupon Court recessed, reconvening in twenty minutes, with all parties present as here-

tofore and the jury all present in the box; whereupon the trial proceeded as follows:

The Court: Do you wish to recall the witness?

Mr. Kay: The witness John Roger Lamb for further cross-examination.

JOHN ROGER LAMB

recalled as a witness on behalf of the Government, having previously been duly sworn, testified as follows:

Cross-Examination

By Mr. Kay:

Q. Mr. Lamb, you are the same John Roger Lamb that testified before here yesterday? [184]

A. That is right.

Q. And you realize you are still under oath and have been sworn? A. That is right.

Q. Just one or two questions. Did you on or about July 10th or 18th, 1950, on the occasion of one of your visits to Ketchikan from your station at the Boca de Quadra in Tatsuda's grocery store in the City of Ketchikan in the presence of Joseph C. Patterson and William Tatsuda make substantially the following statements? Did you make the following statement that "I am going to be the stream patrolman for the Fish and Wildlife Service at Boca de Quadra again this year" that "I just got my appointment," or words to that effect? Did you make such a statement?

A. I don't recall it, sir.

Q. At the same time and same place and in the presence of the same persons did you make sub-

(Testimony of John Roger Lamb.)

stantially the following statement that "There is a lot of money to be made out there this year" that "I made a lot of money out there last year selling fish"? Did you make substantially that statement in the presence of those people?

A. I don't remember saying that.

Q. And did you at the same time and same place and in the presence of the same people say substantially as follows that "I am only going to work with one or two boats this [185] year instead of letting everyone in like I did last year"? Did you make substantially that statement?

A. I don't remember.

Q. And at the same time and place and in the presence of the same persons did you make substantially the following statement: "Why don't you fellows bring the Rolling Wave down there and fish the stream, and we will all make some money"?

A. I don't remember that.

Q. Did you make the following statement at the same time and same place in the presence of the same persons: "There is an early run of fish down there," meaning before the season opened, "Why don't you bring the Rolling Wave down there early and we will all make some money," or words to that effect? A. No.

Q. At the same time and same place and in the presence of the same persons, Joe Patterson and Bill Tatsuda, did you make substantially the fol-

(Testimony of John Roger Lamb.)

lowing statement: "You don't have to worry any about getting caught. I have it all fixed"?

A. No.

Q. You don't recall that?

A. No, I don't.

Q. Now, did you at about the same time in early June of 1950 in Ed and Joe's—— [186]

Mr. Baskin: Now, your Honor, I think he ought to first—well, I will withdraw the objection. Excuse me.

Q. Did you at or about the same time in early June of 1950 have a conversation with Chester Klingbeil, at which you and Chester Klingbeil were present, in Ed and Joe's Pool Room in the City of Ketchikan, Territory of Alaska, in which you made substantially the following statements: "I just got word of my appointment as stream guard out at Boca again this year"? Did you tell Chester Klingbeil that?

Mr. Baskin: Your Honor, I object to that. He hasn't fixed the time as required by statute.

The Court: Well, he said about early in June.

Mr. Kay: Early in June.

The Court: I assume that is as close as you can fix it?

Mr. Kay: That is as close.

The Court: But how about the place and circumstances?

Mr. Kay: Ed and Joe's Pool Room in the City of Ketchikan.

The Court: Persons present?

(Testimony of John Roger Lamb.)

Mr. Kay: Persons present, Chester Klingbeil and the witness.

The Court: Objection overruled. [187]

Mr. Kay: That was the statement, I believe, your Honor.

Q. Did you under those circumstances and at that time and place tell Chester Klingbeil: "I just got word of my appointment as stream watchman out at Boca again this year"?

A. I don't recall that I did.

Q. Did you also at the same time and place and in the presence of the same person state: "You know there is an early run of sockeyes down there before the season opens. Why don't you come down and get them, and we can make some real money this season, and then we can work together this summer fishing the creeks? I am only going to work with one or two boats"? Do you remember making that statement?

A. I don't remember making that statement.

Q. Do you remember having such a conversation with Chester Klingbeil at any time?

A. I have met him several times. He is a longshoreman.

Q. Do you remember having such a conversation at that time and place?

A. I don't believe so.

Q. Did you on June 20th at Thomas Basin in the City of Ketchikan, on the Thomas Basin Float in the City of Ketchikan, in the presence of Ches-

(Testimony of John Roger Lamb.)

ter Klingbeil, again make substantially the following statements: "You should come out [188] and fish down there now," and did Chester Klingbeil at that time tell you substantially, "Where would we market the fish before the season opens"? Do you recall that conversation? A. No, I don't.

Q. And did you at the same time and place, that is, Thomas Basin Float, June 20th, 1950, in the presence of Chester Klingbeil state to Chester Klingbeil: "There is no chance of getting caught out there. I have it fixed"?

A. It would be impossible for me to fix anything.

Q. And did you at the same time and place and in the presence of the same person state to Chester Klingbeil: "If I do get caught I can always turn State's evidence like the fellow up at Red Fish Bay"? Did you make that statement to Chester Klingbeil? A. I did not.

Mr. Baskin: Will you answer the questions loud enough so I can hear you, John?

A. I said, I did not.

Q. Now, on or about August 20, 1950, did you have a conversation with Rollie Lindsey——

Mr. Baskin: Your Honor, I am going to object to any further examination along this line. This has nothing to do with the bribery of Lamb by the defendant. It is wholly irrelevant and immaterial, and I am going to object to it. [189]

The Court: I think it is proper on a defense of this kind. Objection overruled.

(Testimony of John Roger Lamb.)

Mr. Baskin: Very well.

Q. I will have to start again, I believe, Mr. Lamb, with that question. Did you on or about August 20, 1950, have a conversation with Rollie Lindsey aboard the Diamond T in the vicinity of Cygnet Island in the area of the Boca de Quadra in the presence of his cook George in which you made substantially the following statements: "You should come into the creek. There are four or five thousand fish up there. There are a lot of fish in there"? Did you make that statement at that time and place? A. I don't recall that I did.

Q. Did you at the same time and place and in the presence of the same persons state to Rollie Lindsey: "There is a lot of money to be made out here this season. I am only going to work with one or two boats this season"? Did you make that statement to Rollie Lindsey at that time and place?

A. I don't believe so.

Q. Did you at the same time and place and in the presence of the same persons state: "There is no chance to get caught. I have it fixed." Did you state that to Rollie Lindsey? A. No.

Q. Did you at the same time and place and in the presence of [190] the same persons explain to Rollie Lindsey a signal system of flashlights by which the two stream patrolmen or two patrolmen working with you would signal in the event any other Fish and Wildlife boat approached the area?

A. I can't say I did.

Q. And did you at the same time and place and

(Testimony of John Roger Lamb.)

in the presence of the same persons offer to take one hundred dollars per thousand fish for permitting Rollie Lindsey to fish in the closed area of the Boca de Quadra? A. No.

Q. Were you aboard the Diamond T about four times on August 20, 1950?

A. I don't recall ever being aboard.

Q. You don't recall ever being aboard?

A. That is right.

Q. No further questions. Just a moment. One further question. Did you on August 21, 1950, board at any time during that day, board the Diamond T and the Rolling Wave in the vicinity of Cygnet Island in Boca de Quadra when the two boats were tied together? A. I don't believe I did.

Mr. Kay: No further questions.

Redirect Examination

By Mr. Baskin:

Q. John, some of these questions you have answered categorically [191] "No" and some you have said "I don't recall." If you had made those statements, would you have recalled them?

A. Yes, I would.

Q. If you don't recall, you didn't make the statements; is that correct?

A. I don't believe I did.

Mr. Baskin: That is all.

Recross-Examination

By Mr. Kay:

Q. You don't believe you did? A. No.

(Testimony of John Roger Lamb.)

Redirect Examination

By Mr. Baskin:

Q. You said if you had made them you would have remembered them?

A. I should think I would; yes.

Q. And you don't remember making them?

A. No, sir.

Q. And if you had made the statements, you would have remembered them?

Mr. Kay: I object to the continued repetition by the United States Attorney. He is trying to elicit something which this witness has repeatedly, and repeatedly throughout [192] this trial, said that he doesn't remember, he can't recall.

The Court: Well, but testimony of that kind should be subjected to a rather searching examination, I think. Objection is overruled.

Q. If you had made those statements, would you have remembered it now?

A. I believe I would; yes.

Mr. Baskin: That is all.

(Witness excused.)

The Court: Do you wish to recall the defendant?

Mr. Kay: Yes, sir. I would like to recall the defendant Joseph Patterson at this time, sir.

JOSEPH C. PATTERSON

recalled as a witness on his own behalf, having previously been duly sworn, testified as follows:

Direct Examination

By Mr. Kay:

Q. You realize you are still under oath in this case having left the stand, Mr. Patterson?

A. Yes.

Q. Now, Mr. Patterson, you had, I believe before we withdrew you from the stand, testified that you had a conversation in the rear of Tatsuda's grocery store some time in July of 1950 with John Roger Lamb; is that correct?

A. That is correct. [193]

Q. Now, I will ask you the following question. Wait a minute. Who was present during that conversation?

A. Bill Tatsuda, John Lamb and I.

Q. And you have already testified as to how you came into the conversation, by being called into the rear of the store; is that correct?

A. That is correct.

Q. Now, at that time and place and in the presence of yourself and Bill Tatsuda did John Lamb make substantially the following statements, that he was going to be the stream patrolman for the Fish and Wildlife at Boca de Quadra again this year; had just gotten his appointment? Did he make that statement? A. Words to that effect.

Mr. Baskin: Your Honor, I object to that and ask that it be stricken, that the question does not

(Testimony of Joseph C. Patterson.)

meet the impeaching form as required by the statute.

The Court: Well, you mean that it has to be in the identical language?

Mr. Baskin: Well, that is what you have stated, that is what you have ruled.

The Court: Well, if I said identical, I meant substantially identical.

Mr. Baskin: He hasn't sufficiently fixed the time and place that this conversation occurred with this witness. [194]

The Court: The statute requires that the conversation be identified by time, place, circumstances and persons present so that there won't be any mistake on the part of the impeaching witness or the witness sought to be impeached that it was the same conversation in each instance. With that in mind, it is sufficient that it be substantially—it meets the requirements if it is substantially identical or if it is in substance and effect what the witness was questioned about, but it doesn't seem to me that you have fixed the time here. You fixed the time in the impeaching question asked Lamb, July 10th.

Mr. Kay: Didn't I say, "July 10th or July 18th on the occasion of one of your visits to Ketchikan from Boca de Quadra"?

The Court: Well, it may be. All I have is July 10th. But, anyway, whatever it was by which you called it to the attention of Lamb, it should be embodied in the question to this defendant.

Mr. Kay: All right.

(Testimony of Joseph C. Patterson.)

The Court: So far as the time and place are concerned.

Q. Mr. Patterson, did you, on or about July 10th or 18th of the year 1950 on the occasion of one of the visits of John Roger Lamb to the City of Ketchikan from his duties as stream watchman at Boca de Quadra, in Tatsuda's grocery [195] store in the City of Ketchikan, Territory of Alaska, in the presence of yourself, John Lamb and Bill Tatsuda, did John Roger Lamb at that time and place and in the presence of those persons make substantially the statement that "I am going to be the stream patrolman for the Fish and Wildlife Service at Boca de Quadra again this year. I have just got my appointment"? Did John Lamb say substantially that there at that time? A. Yes.

Q. At the same time and place and in the presence of the same persons and during the same conversation, did John Roger Lamb make substantially the following statement that "There is a lot of money to be made out there this year" that "I made a lot of money out there last year"? Did he say that at that time and place? A. Yes.

Q. And at the same time and place and in the presence of the same persons and in the same conversation, did he make substantially the following statement that "I am only going to work with one or two boats this year instead of letting everyone in like I did last year"? Did he say that at that time and place? A. Yes.

Q. And did he at the same time and place and

(Testimony of Joseph C. Patterson.)

in the presence of the same persons and in the same conversation make [196] substantially the following statement: "Why don't you fellows bring the Rolling Wave down there and fish the stream, and we will all make some money"; did he make substantially that statement? A. Yes.

Q. And did he at the same time and place and in the presence of the same persons and in the same conversation suggest substantially the following that "You bring the Rolling Wave down there before the season and get in on the early run of sockeyes," or words to that effect? A. Yes.

Q. And did he at the same time and place and in the presence of the same persons and in the same conversation say substantially the following: "You don't have to worry any about getting caught. It will all be fixed," or "I have it all fixed," or words to that effect? Did he say that at that time and place? A. Yes, he did.

Q. Now, Joe, after that conversation—well, let me ask you this. Was any definite deal made or arranged between yourself and Lamb or yourself, Tatsuda and Lamb at that time and place and during that conversation with John Lamb?

A. No.

Q. Now, at that time were you engaged in preparing the Rolling Wave to fish during the season of 1950? [197] A. I was.

Q. And did you have the boat ready to fish at that time, or what was the stage of your preparations; do you recall, Joe?

(Testimony of Joseph C. Patterson.)

A. No; the boat wasn't ready to fish. It had a fire on it.

Q. And did you finally get the boat ready and leave Ketchikan preparatory to fishing?

Mr. Baskin: Your Honor, I object to this questioning. It is all leading. The last question was leading, and this one is leading, and I object to them and ask they be stricken.

The Court: Well, but aren't they on more or less collateral issues; you don't think that it goes to any vital issues in this case?

Mr. Kay: You don't deny he went fishing, do you?

Mr. Baskin: But they are still leading, your Honor, and he can lead him all around if he wants to, but I am objecting to it. The questions are supposed to be in the proper form.

The Court: Well, unless they are preliminary or introductory and even on collateral matters why leading questions may be permitted. Objection overruled. You may answer.

A. We had the boat ready to fish August 12th.

Q. After you got the boat ready, do you recall who, if anyone, you had as crew? [198]

A. Yes; I had the crew ready on the 13th.

Q. Would you mind stating who the crew members were?

A. Fred Milton, Carl Mossberger, Allen Churchill, Bill Cummings.

Q. Which one of those, if any of them, was the skipper of the craft, Joe? A. Fred Milton.

(Testimony of Joseph C. Patterson.)

Q. After you had the boat ready on August 13th, what, if anything, did you do?

A. Put the groceries aboard and got ready to go. That is all.

Q. Did you depart the Port of Ketchikan en route to somewhere fishing on some date?

A. August 14th about noon.

Q. And where did you go?

A. We went to the Boca de Quadra.

Q. Now, into what general area in Boca de Quadra did you go? A. Near Cygnet Island.

Q. Now, as you—that was on August 14th that you left Ketchikan and departed to Boca de Quadra? A. That is right.

Q. Now, as you approached or rounded an island, near Cygnet Island, did anything happen?

A. John Lamb came out and met us at the boat.

Q. About how far did he run out to meet you, if any distance?

A. About a mile, a mile and a half. [199]

Q. What was he riding in when he came out to meet you? A. The outboard and skiff.

Q. And what, if anything, happened then?

A. John Lamb came aboard the boat and tied onto us, and we talked aboard the boat and went over by his boat and tied up about a mile or mile and a half from where he originally came aboard.

Q. John Lamb came aboard the boat, and you towed him over to the vicinity of his boat; is that correct? A. Yes.

(Testimony of Joseph C. Patterson.)

Q. And did any conversation occur with John Lamb during the time that he was aboard the boat there as you were towing him over to the island?

A. Yes.

Q. Could you state to the best of your recollection where the members of the crew were during this conversation?

A. I think there was one or two crew members on deck and possibly one asleep, and the skipper was up on top of the pilothouse.

Q. And was this conversation between yourself and John Lamb primarily?

A. Well, I imagine it was primarily between us, but I think Carl Mossberger heard part of the conversation.

Q. All right. Will you state to the jury, please, to the best of your recollection, what was said in this conversation [200] with John Lamb at that time?

Mr. Baskin: Your Honor, I object to that as hearsay and, if it is attempting to impeach the witness John Roger Lamb, it is not in the proper form, and the proper predication has not been laid for it.

Mr. Kay: Hearsay, your Honor?

The Court: I don't think that that objection is available.

Mr. Kay: And I am not attempting to impeach the witness Lamb. I didn't ask the witness Lamb any impeaching questions, as I recall, about this conversation.

The Court: Well, if you didn't ask him about this conversation——

(Testimony of Joseph C. Patterson.)

Mr. Kay: I asked if he had any conversation on August 14th, and he said he had none, none whatever. I couldn't ask him anything else other than that.

The Court: Of course, you could have called the conversation to his attention, but since it is not so very long ago I think it may be presumed that he wouldn't have forgotten it. Objection overruled.

Q. You can state substantially to the jury, Joe, just what conversation took place between yourself and John Roger Lamb on the occasion on August 14th while he was towing you into, while you were towing him, rather, into the anchorage. [201]

A. John Lamb said there was quite a few fish up in the creek, a lot of money to be made, and he had everything fixed if we would go up and catch them, so he repeated this with other suggestions during this about a mile or a mile and a half run, and we tied up, and all of the crew, we talked about it to them, and I didn't want to do it. The crew didn't want to do it. So we told him no; that was about all of it.

Q. Now, at that time after you pulled over to the anchorage what, if anything, did John Lamb do, Joe, to the best of your recollection?

A. After we anchored and had an evening meal, why, John Lamb came back aboard the boat.

Q. First he left the boat, I take it?

A. Yes; he left the boat.

Q. Where did he go?

A. He went back to his boat.

Q. Was his boat anchored nearby?

(Testimony of Joseph C. Patterson.)

A. Nearby our boat.

Q. Then what happened?

A. Then after the evening meal he came back to our boat, and three of our crew members had gone for a ride in the skiff. They went up the creek to look at the fish and, while they were gone, why, John Lamb and I talked again, talked about the possibilities of making money. [202]

Q. Now, where did this conversation occur, and who was present, if you recall, during any part of the conversation?

A. This was in the fo'c'sle. I was washing dishes.

Q. And was any other crew member or any other person present during any part of the conversation?

A. Carl Mossberger came down part of the time.

Q. Now, to the best of your recollection, Joe, will you state to the jury substantially what John Lamb said to you and what you said to him during the course of this conversation that evening after dinner aboard the boat?

A. Well, this conversation in the evening was about the same as before; how many fish there; how he had things fixed; and how much money could be made.

Q. Do you recall anything else that was said?

A. No, I don't.

Q. To refresh your recollection, do you recall whether he said anything about having made

(Testimony of Joseph C. Patterson)
enough money to buy a house in Washington, or words to that effect? A. Oh, yes, he did.

Mr. Baskin: Well, your Honor, it is immaterial to this case, and all that part of it is immaterial as to what he said. It doesn't relate to this bribery here. I object to that part of the conversation.

The Court: Well, I think the objection will have to be overruled. It isn't whether some particular statement is [203] material or not, it is what was said in the conversation between them that led up to this. It may be that some of the statements would be immaterial and might be even irrelevant, but, if it is part of the conversation, why, it may be testified to.

Q. To refresh your recollection further, did he say anything about having made enough money selling stolen fish the previous year to buy a troller; do you recall that?

A. Yes, I remember now. He said that he had made enough money last year selling fish out of the creek to pay all his bills, buy a troller and a seven-thousand-dollar home in Washington.

Q. And I don't know whether it was in this conversation or not, but you will know, to refresh your recollection further, did he say anything about any other agents in the area at that time?

A. Oh, yes. I said a while ago, he said he had everything fixed. He had the agents fixed, he said. He said there was two guys on a Chris-Craft and he had them fixed.

(Testimony of Joseph C. Patterson)

Q. Now, following that conversation what did John Roger Lamb do, if anything? Did he remain aboard the Chris-Craft, or what happened?

A. Well, he went back to his boat, and I didn't see him any more.

Q. All right. Now, then, what happened on the following day, [204] if you can recall? Did you remain in that area, or what did you do?

A. The following day about four o'clock we pulled anchor and went to Point Alva, I believe, or Lucky Cove and fished there all day.

Q. Now, en route out of the Boca de Quadra, that is about four o'clock in the morning, did anything happen?

A. Yes. Two Fish and Wildlife agents came aboard, but I didn't see those Fish and Wildlife agents because I was cooking. I didn't see them.

Q. You just know that they did come aboard?

A. The crew told me that they were aboard.

Q. I see. Well, then, that is hearsay as far as you are concerned. You didn't talk to them then; is that correct? A. No.

Q. And where was the Rolling Wave on August 15th? Have you answered that question already?

A. I told you where we fished August 15th. The evening of August 15th we went back to Boca de Quadra, I believe.

Q. Now, did you have—I mean, did you see John Roger Lamb again on the 15th or on the 16th of August, 1950? A. Yes.

Q. And where did you see him?

(Testimony of Joseph C. Patterson.)

A. He came aboard the boat.

Q. Was anyone with him on that [205] occasion?

A. On that occasion John Lamb and Warner and—there was another man with Warner on the boat. I didn't see him. I saw a man but I didn't know who he was.

Q. Do you recall whether they boarded the boat or whether they remained aboard the vessel on which they approached the Rolling Wave?

A. They tied to the Rolling Wave. John Lamb came aboard, and he introduced me to Warner, and Warner was on the front of the, on the fo'c'sle of the Chris-Craft on his hands and knees talking to us.

Q. Now, what, if anything, did John Lamb say to you or you say to him on this occasion there in the Boca de Quadra on August 15th or 16th, 1950, when the Chris-Craft was tied up to the Rolling Wave, if you can recall?

A. John said, "I just wanted to prove to you that everything is fixed," and after he introduced me to him he said, "There are a lot of fish up there tonight. If you guys want to go up there and fish," he says, "there is nothing to worry about. We have the light signal all figured out," and Warner said, "Yes," and that is the conversation; that is about all there was to it.

Q. Now, did anything happen in connection with John Roger Lamb and the Rolling Wave dur-

(Testimony of Joseph C. Patterson.)

ing the afternoon of the 16th of August, 1950, to the best of your recollection, Joe?

A. Yes. He came aboard. [206]

Q. He came aboard again that day, to the best of your recollection? A. Yes.

Q. And did you have any conversation with him at that time?

A. Yes. He wanted us to go in the creek again.

Q. And what, if anything, did he say to you at that time and you say to him, just the best you can recall for the jury?

A. About the same conversation. "We have got things fixed. Are you going to fish or not? If you are not going to fish, I am going to get somebody else." And that is the afternoon we decided to go and fish in the creek.

Q. Did you thereafter—well, was anything said about the price either at that time or in any other conversation?

A. Yes. He said one hundred dollars a thousand, and I agreed to it.

Q. And did you thereafter proceed into the closed area of the Boca de Quadra and there take fish? A. I did.

Q. And upon how many occasions, if you can recall, Joe, did you so fish? A. Three times.

Q. And did you in accordance with your agreement with Lamb pay him one hundred dollars a thousand for the fish so taken?

A. I did. [207]

(Testimony of Joseph C. Patterson.)

Q. And upon which occasions did you do that?

A. I fished on the night of the 16th and I paid him on the 17th, two hundred and eighty dollars. I fished on the night of the 17th and I paid him on the 18th, two hundred and fifty dollars. I didn't fish on August 18th, but I did on the 19th and I paid him Monday the 21st, twenty dollars.

Q. Joe, have you ever fished prior to the season of 1950? A. No; not commercially.

Q. Commercial fishing, I mean? A. No.

Q. Prior to your going out or prior to your meeting John Lamb, did you ever have any intentions of fishing illegally or bribing a stream watchman?

A. I didn't even know what illegal fishing was until this year.

Mr. Baskin: Your Honor, I object to that as a self-serving statement, and that the jury be instructed not to consider it.

Mr. Kay: May it please the Court, if I could be heard on that. One of the elements of the alleged entrapment is whether or not the defendant was a hitherto innocent person having no intention of committing a crime until lured into it by a Government official.

The Court: Of course, the answer wasn't responsive [208] to the question, but necessarily in a case of this kind a lot of the statements that are made will be in the nature of self-serving statements. Objection overruled.

Mr. Kay: Pardon me.

(Testimony of Joseph C. Patterson.)

The Court: Of course, you knew what the limits of legal fishing were when you did go out to fish?

A. Yes, I did then; yes.

Mr. Kay: You may cross-examine.

Cross-Examination

By Mr. Baskin:

Q. Joe, what day was it that you fished out at Boca de Quadra within the area closed to commercial fishing, the first day? A. 16th of August.

Q. August? A. Yes.

Q. And where did you fish?

A. In Mink Arm in the creek.

Q. You mean up in the creek? Of what creek, do you know? Was that Humpback Creek?

A. I wouldn't even say that I know what creek it was.

Q. You do know it was within an area that was closed to commercial fishing?

A. Yes, I do know that; yes. [209]

Q. And you were aboard the Rolling Wave at that time? A. That is right.

Q. And who were the crew that was on the Rolling Wave at the time?

A. Fred Milton, Bill Cummings, Allen Churchill and Carl Mossberger.

Q. And the whole boat and all of the crew participated in that illegal fishing; isn't that right?

A. That is right.

Q. When did you pay John Roger Lamb for fishing illegally in that stream?

(Testimony of Joseph C. Patterson.)

A. I fished illegally on August 16th. I paid John on the 17th after I had hold the fish.

Q. And how much did you pay him?

A. Two hundred and eighty dollars.

Q. How many fish did you catch?

A. I don't remember how many fish there was.

Q. Well, you were paying him, weren't you, one hundred dollars per thousand?

A. Yes, I was paying him one hundred dollars per thousand.

Q. Well, how many did you catch then?

A. I think we have the fish ticket right there. We can know exactly.

Q. Well, just say how many approximately.

Mr. Kay: We can supply this. [210]

Mr. Baskin: I am asking the witness. He should know how many he caught.

Q. You can say about how many you caught.

A. I would say about three thousand—I don't know.

Mr. Kay: I object on the ground that is not the best evidence.

Mr. Baskin: He can testify as to what he knows from his own mind.

The Court: It is just a matter of computation if he paid at the rate of one hundred dollars a thousand. A. We have the ticket here.

Q. I am asking you. I am not asking for the tickets.

(Testimony of Joseph C. Patterson.)

The Court: It is not subject to the best evidence rule. Anyhow, it is just a collateral matter, the amount.

Q. You caught about three thousand, you say, and then when did you fish again?

A. On August 17th.

Q. You mean the same day you paid him the bribe?

A. Come in that afternoon, paid him the bribe, and went on in and fished that night, and sold the fish the next day, and came back on August 18th and paid him for the fish we caught on the 17th.

Q. And how many fish did you catch on the 17th?

A. I gave him two hundred and fifty dollars.

Q. Then you were still paying him one hundred dollars per [211] thousand?

A. One hundred dollars a thousand.

Q. So how many fish did you catch? That would be about three thousand fish again, wouldn't it?

A. A little less than three thousand.

Q. About twenty-five hundred?

A. Something around there; I don't know.

Q. And what day did you pay him that, the two hundred and fifty dollars?

A. I paid him on Friday the 18th.

Q. That was two hundred and fifty dollars?

A. That is right.

Q. And then when did you fish again?

A. On Saturday the 19th.

(Testimony of Joseph C. Patterson.)

Q. How many did you catch?

A. Two hundred and fifty-six; I remember that.

Q. Two hundred and fifty-six fish. And how much did you pay Lamb? A. Twenty dollars.

Q. Then when did you pay Lamb then?

A. I paid him on Monday the 21st.

Q. Then in total you gave him two hundred and eighty dollars on the 17th, and on the 18th two hundred and fifty, and on the 21st twenty dollars?

A. Five hundred and fifty dollars. [212]

Q. And that was to pay Lamb for permitting you and your crew and vessel to fish illegally in the closed waters of Boca de Quadra; is that correct?

A. I gave him the money for letting me go and catch the fish.

Q. Then answer the question. You paid him the money for permitting you to fish in the waters closed to commercial fishing; is that right? Answer that yes or no. A. Yes; yes.

Q. Now, then, you knew that it was against the law to fish illegally out there, didn't you, when you fished? A. Certainly did.

Q. And you went ahead and fished?

A. Yes.

Q. And you also know that it is a violation of the law to pay a man a bribe to permit you to fish; didn't you? A. Yes.

Q. And you went ahead and paid the bribe?

A. Yes.

Q. Did anybody force you to do that?

A. Not that I know of.

(Testimony of Joseph C. Patterson.)

Q. Did anybody force you to pay the money to Lamb as you described? A. No.

Mr. Kay: I object to that question as irrelevant, immaterial and incompetent. The question of force does not [213] enter into the question of entrapment or into any part of this case whatever, not material to the Government's case, and it is not material to our case. Obviously, he was not forced at gun-point in there.

The Court: Well, it may not be a requirement so far as entrapment is concerned, but nevertheless it is a proper cross-examination. He can't make anything of it as a matter of law or anything of that kind, but it is proper cross-examination.

Mr. Kay: Well, doesn't cross-examination have to be somehow relevant to some of the issues in the case?

The Court: It is relevant, except that he wouldn't have to be forced into it; he could be coerced into it or persuaded into it.

Mr. Kay: Correct. That is why I say that force is no element because force is not an element of their case, bribery; and it is not an element of our defense.

The Court: That may be true, but nevertheless it is not improper cross-examination. Objection is overruled.

Q. Then you paid him voluntarily?

A. That is right.

Q. And you fished voluntarily?

A. That is right.

(Testimony of Joseph C. Patterson.)

Q. Now, you testified a while ago with relation to a conversation with Lamb on or about the, I believe you said the [214] 10th of July or 18th of July. Now, what day was it that you had that conversation with him?

A. You want to know whether it was the 10th or the 18th?

Q. That is right. A. I don't know.

Q. You don't know. And he told you that he had just been appointed as Fish and Wildlife agent; isn't that what you said?

A. He told me he had been appointed Fish and Wildlife agent.

Q. That wasn't the question. The question was asked you, didn't he say—now, isn't that what you said? That was the impeaching question that was asked you? Now, what did you say?

A. That he had just been appointed?

Q. That is the question that was asked you; yes.

Mr. Kay: Well, now, I object to that as a statement on his own behalf. I don't recall that I asked a question in that precise form. I would like to check the record.

The Court: It is my recollection that you asked it in that form.

Mr. Baskin: That is exactly what he said. I know what he said.

Q. Didn't he ask you the question and didn't you say that he had just been appointed an agent for the Fish and Wildlife Service? [215]

A. Yes.

(Testimony of Joseph C. Patterson.)

Q. And you say that was on July 10th?

A. That is right.

Q. It wasn't the 18th?

A. The 10th or 18th; one; I don't know.

Q. Well, which one was it? You know; you were there the eight days apart. Which day was it?

A. I don't know.

Q. Well, you know it is one of them, don't you?

A. I think it is one of them.

Q. And you know also that Lamb had been a Fish and Wildlife agent for over a month, don't you? A. I didn't know it at that time.

Q. Well, you know it now, don't you?

A. Sure, I know it now.

Q. And didn't you testify that you had met him during June of 1950; didn't you say that you saw him during June of 1950 on your direct examination? A. Possibly I did see him.

Q. Then you knew he was an agent before, didn't you, before July 10th?

A. I guess I did know he was an agent before then. I don't remember.

Q. You did know he was an agent for the Fish and Wildlife before July 10th then, didn't [216] you? A. I guess I did.

Q. Why don't you say that when I ask you?

A. I am not positive.

Q. Now, then, you stated with relation to this conversation that Lamb had, that you had with him on several occasions, and he told you, didn't he say,

(Testimony of Joseph C. Patterson.)

or did not you say that he said that he had everything fixed? A. He did.

Q. Then he didn't tell you that he was going to arrest you, did he? A. No.

Q. In other words, he told you that he didn't intend to arrest you, or left you with that impression? A. He did.

Q. He at no time told you that he was going to arrest you? A. No.

Q. And that he had it fixed so that you wouldn't be arrested; isn't that right? A. That is true.

Q. And didn't he say, or in words to the effect that you wouldn't be arrested for illegal fishing in that area or wouldn't be prosecuted for illegal fishing in the Boca de Quadra?

A. He said there wasn't much chance of being caught because he had it fixed. [217]

Q. Now, Joe, I ask you, you are also known as Joe Patterson, aren't you? A. Yes.

Q. And I ask you if you are the same Joe Patterson in the case of the United States of America vs. Joe Patterson in the United States Commissioner's Court at Ketchikan, Alaska, on or about December 29, 1948? A. 1948?

Q. Yes.

Mr. Kay: I don't know what the United States Attorney intends but, if he intends what I think he does, he is going about it the wrong way according to the statutes of the Territory of Alaska, in my impression at least.

(Testimony of Joseph C. Patterson.)

(Testimony of Joseph C. Patterson.)

The Court: What do you think the correct way is?

Mr. Kay: I would like to know.

Mr. Baskin: Well, I can show him pretty quick.

The Court: Well, there is nothing the Court can rule on at the present time so——

Mr. Kay: Well, I object to the question as improper.

The Court: Objection overruled.

Mr. Kay: Prejudicial to the defendant.

The Court: Well, if it doesn't relate to a conviction, it certainly would be prejudicial, but I don't believe counsel is asking anything else except about the conviction.

Mr. Kay: Why doesn't he ask it in the proper form? [218]

The Court: Well, what is the proper form?

Mr. Kay: "Have you ever been convicted of a crime?"

The Court: But the Court of Appeals ruled otherwise. You can proceed in either way. You can start out with the judgment roll, and it is up to the prosecutor to determine which way he shall proceed.

Q. Were you the same Joe Patterson in the case of the United States of America vs. Joe Patterson in the United States Commissioner's Court at Ketchikan, Alaska, on or about December 29, 1948?

A. Yes, I guess that is the case.

Mr. Baskin: Your Honor, I offer in evidence the certified copy of the judgment and conviction

(Testimony of Joseph C. Patterson.)

of Joseph Patterson on December 29, 1948, in the United States Commissioner's Court at Ketchikan, Alaska.

The Court: Any objection?

Mr. Kay: I object to it until I have seen it. No objection.

The Court: It may be admitted and marked as an exhibit.

(Whereupon the exhibit was marked Plaintiff's Exhibit No. 3.)

(Thereupon the jury was duly admonished and Court recessed until 2:00 o'clock p.m., October 24, 1950, reconvening as per recess, with all parties present as heretofore and [219] the jury all present in the box; whereupon the defendant, Joseph C. Patterson, resumed the witness stand, and the Cross-Examination by Mr. Baskin was continued as follows:)

Mr. Baskin: May I see that Government Exhibit? Ladies and gentlemen of the jury, I have here a certified copy of the judgment and conviction of Joe Patterson in the United States Commissioner's Court, Ketchikan, Alaska, on or about December 29, 1948, in which he was convicted in Counts 1 to 7 for selling intoxicating liquor without a Territorial license, and in Count 8 he was convicted for maintaining a common and public nuisance. On each of those eight counts he was fined two hundred dollars, or a total of sixteen hundred dollars. For the record I think I should

(Testimony of Joseph C. Patterson.)

state that the judgment I just read is Plaintiff's Exhibit No. 3.

Q. Joe, were you the same Joseph Patterson in the City Magistrate's Court at Ketchikan, Alaska, on September 24, 1948, in case No. 4902?

A. I think that would be the date.

Mr. Baskin: Your Honor, I would like to offer in evidence the original judgment of conviction of Joseph Patterson on September 28, 1948, in the City Magistrate's Court at Ketchikan, Alaska. Any objection?

Mr. Kay: I would like to see it. I don't know whether that is a properly certified and authenticated copy, but I have no objection. [220]

Mr. Baskin: Very well.

The Court: It may be admitted.

Mr. Baskin: Will you mark that, please?

Clerk of Court: The exhibit has been marked Plaintiff's Exhibit No. 4.

Mr. Baskin: Ladies and gentlemen of the jury, Plaintiff's Exhibit No. 4 reads as follows: "Ketchikan, Alaska. Police Department. September 24, 1948. Name: Joseph Patterson. Arrested by Lang. Charge: Operating a gambling game. Date of Trial, September 24, 1948; guilty. Bail, if any, $100.00. Sentence: $100.00 and 30 days suspended subject to good behavior." That shows the fine was paid on September 24, 1948; signed by Edward F. Ginger, Magistrate.

Q. Now, Mr. Patterson, were you the same Joe

(Testimony of Joseph C. Patterson.)

Patterson, were you the Joe Patterson in the City Magistrate's Court at Ketchikan, Alaska, on or about September 24, 1948, in case No. 4903?

A. I don't remember. I thought it was all one case, that other one.

Q. Well, just tell the jury were you or were you not the Joe Patterson on that same date, September 24, 1948, in the City Magistrate's Court at Ketchikan, Alaska, in cause No. 4903?

A. I don't know.

Q. Do you deny that you were? [221]

A. No, I don't deny it, but I am not sure.

The Court: Why don't you identify it by something else than number to refresh his memory?

A. I wouldn't know the numbers.

Q. Were you also charged on that day of September 24, 1948, of selling and serving liquor without a license?

A. That was the same charge, I believe. I don't understand it. It was two charges?

Q. Two charges. And one was operating a gambling game; that is the one I just read to the jury.

A. That is true.

Q. And then there was another charge of selling liquor and serving liquor without a license; is that right?

A. I thought that was a Territorial and not in the City Magistrate's Court.

Q. Well, I am asking you now. It is your testimony. I have a record here of it, and I am asking you, were you the defendant, or were you the Joe

(Testimony of Joseph C. Patterson.)

Patterson on or about September 24, 1948, in the City Magistrate's Court at Ketchikan, Alaska, in No. 4903 charged with selling and serving liquor without a license; were you that same Joe Patterson as mentioned in that case?

A. I was charged with gambling and with selling liquor without a license, but the case number I don't remember that.

Q. Very well; then you admit then that you were the same Joe [222] Patterson as I just described? A. Oh, yes, I do.

Q. Very well.

Mr. Baskin: Your Honor, I would like to introduce the original record of the judgment and conviction in that case.

Mr. Kay: I believe—I would appreciate it, if Mr. Baskin would, when he reads these exhibits, read all of them.

Mr. Baskin: Very well. I read all of the other one.

Mr. Kay: I am sorry. I don't believe you did.

Mr. Baskin: Will you mark this as an exhibit please?

Clerk of Court: The exhibit has been marked Plaintiff's Exhibit No. 5.

Mr. Baskin: Ladies and gentlemen of the jury, Plaintiff's Exhibit No. 5 reads as follows: "Ketchikan, Alaska; Police Department; No. 4903; September 24, 1948. Name: Joe Patterson. Arrested by Lang. Charge: Selling and serving liquor without a license. Date of trial: September 24, 1948. Plea:

(Testimony of Joseph C. Patterson.)

Guilty. Verdict: Guilty. Bail if any and amount, $100.00. Sentence: $100.00 and 30 days suspended subject to good behavior. Date fine paid or bail forfeited, September 24, 1948. Amount, $100.00." Signed by Edward F. Ginger, Magistrate.

Q. Now, Mr. Patterson, tell the jury whether or not you were convicted of a crime under the name of Joseph Cullen Patterson [223] in the Police Court at San Diego, California, on or about October 15, 1937?

A. If you will refresh my memory on the particular one, I will tell you if I can.

Q. That was for battery and disorderly conduct?

A. I wouldn't say it was that particular date, but I possibly was.

Q. Then do you admit that you were convicted on or about October 15, 1937?

The Court: The date is immaterial. Just ask him if he has been convicted of the crime named.

Q. Well, were you convicted then of the crime that I just described? A. Yes.

Q. Now, tell the jury whether or not you were convicted in the Police Court at San Diego, California, under the name of Joseph Cullen Patterson on or about August 25, 1943, for the crime of soliciting gambling?

A. I don't remember the date. If you will read off the charges, I will admit I was convicted of all of them.

The Court: Just omit the date then.

Mr. Baskin: Very well.

(Testimony of Joseph C. Patterson.)

Q. The charge was soliciting gambling. Were you convicted in that Court as I have stated?

A. Yes. [224]

Q. You stated on your direct examination that you operate the 400 Club; didn't you?

A. That is right.

Q. Where is that club located?

A. 400 Stedman Street.

Q. In Ketchikan, Alaska?

A. That is right.

Q. What kind of a club is that?

Mr. Kay: I object to that as immaterial, irrelevant and incompetent, your Honor.

Mr. Baskin: Your Honor, it is cross-examination.

The Court: His occupation is never immaterial. Objection overruled.

Q. What kind of a club is that?

A. It is just the name of it; 400 Club.

Q. Well, what is the club then?

A. It is a restaurant.

Q. What do you do as a restaurant? How do you operate it as a restaurant?

A. Serve food.

Q. How long have you operated it as a restaurant? A. Since October of 1947, I believe.

Q. Have you ever operated it as any other kind of business?

A. Sure. I have been convicted of selling liquor without a license there. [225]

(Testimony of Joseph C. Patterson.)

Q. And were you convicted of operating a gambling game there? A. Yes.

Q. Then you operate that also as a gambling house; is that right; or a place to gamble?

A. We gamble.

Q. And you so operated that 400 Club as such; is that right? A. That is right.

Q. And you have been operating it as such since 1947?

A. In October or September; I think it was October, 1947.

Q. Up to the present time?

A. Not to the present time, no; a couple months ago.

Q. Up until a couple months ago then.

Mr. Baskin: No further examination.

Redirect Examination

By Mr. Kay:

Q. Joe, after those convictions for these misdemeanors back in 1937 or 1938—where did those convictions occur? A. San Diego, California.

Q. Between that time and the time you came to Ketchikan, Alaska, where were you, Joe?

Mr. Baskin: Your Honor, I object to that. That is immaterial and irrelevant to the issues in this case.

Mr. Kay: I believe the occupation and the background of the defendant is something—— [226]

Mr. Baskin: It is not. I was impeaching the witness and——

(Testimony of Joseph C. Patterson.)

Mr. Kay: Impeaching? By that kind of evidence? That certainly is incompetent. If that was the purpose of your examination. I object to it and ask that it be stricken.

The Court: Well, of course, that is not the purpose. It is merely to show the defendant's background so that the jury may appraise his testimony.

Mr. Kay: Yes, sir; precisely.

Q. Well, where were you?

Mr. Baskin: Your Honor, I am objecting to that. It is immaterial and irrelevant as to where he was.

The Court: I think the question is too indefinite and that the objection should be sustained.

Q. Where did you go between your last conviction in 1943 and the——

Mr. Baskin: Your Honor, I object to that.

Q. And the time you arrived in Ketchikan, Alaska?

The Court: Objection sustained.

Q. Isn't it a fact that you served in the——

Mr. Baskin: Your Honor, I object to that.

Mr. Kay: Well, what in the world—I haven't asked the question.

Mr. Baskin: We know what you are going to ask.

A. Army. [227]

The Court: Well, I assume you are asking him about military service which is improper. Objection sustained.

Q. Mr. Baskin asked on his cross-examination if

(Testimony of Joseph C. Patterson.)

you were forced by John Roger Lamb to go out to the Boca de Quadra this summer and engage in illegal fishing. Do you recall him asking you that?

A. Yes.

Q. And I believe your answer was that you were not forced; is that correct?

A. I was not forced.

Q. Were you persuaded and solicited by John Roger Lamb to go out to Boca de Quadra this summer and fish illegally in the closed area?

A. Yes.

Q. And were you so solicited by John Roger Lamb in the presence of Richard Warner, another Fish and Wildlife agent? A. Yes.

Mr. Baskin: Your Honor, I object to that as being leading questions. It is certainly one of the crucial questions here, and I object to both of them as leading and ask that the jury disregard it.

The Court: Well, I thought he testified to all that, and of course it is just a recital of his testimony then which would not make it objectionable.

Mr. Baskin: Well, I object to it then as repetition. [228]

Mr. Kay: No further questions.

Mr. Baskin: No further examination.

(Witness excused.)

WILLIAM N. TATSUDA

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Kay:

Q. Will you state your name please, Mr. Tatsuda? A. William N. Tatsuda.

Q. And where do you live, Bill?

A. I live at 525 Grant Street.

Q. Is that in the City of Ketchikan?

A. Yes.

Q. Territory of Alaska? A. Yes.

Q. And how long have you lived here in Ketchikan, Mr. Tatsuda?

A. Well, all my life except for the time I was in the Army and out of the country.

Q. Well, now, Mr. Tatsuda, are you acquainted with the defendant, here, Joseph C. Patterson?

A. Yes, I am.

Q. Are you acquainted with a person here in town by the name of John Roger Lamb?

A. Yes, I am. [229]

Q. How long have you known John Roger Lamb, Mr. Tatsuda?

A. I would say about three years.

Q. And how long have you known Joe Patterson? A. About the same, about three years.

Q. What has been the nature of your acquaintanceship with John Roger Lamb?

A. Well, he trades in our store; he has for about

(Testimony of William N. Tatsuda.)

the last two years, and that is about the extent, and then conversation I had with him.

Q. Well, now, you say he trades at your store. Are you engaged in the grocery business here in town? A. That is right.

Q. Calling your attention to the month of November or December in the fall of 1949, last year that is, did you have any conversation with John Roger Lamb about fishing in the, about fishing out at Boca de Quadra during the summer of 1950?

Mr. Baskin: May it please the Court, just a moment, I object to that. That, as I understand the issues of this case, does not relate, has not been connected up in any way with the defendant, and further there certainly was no predicate laid for the asking of an impeaching question of John Roger Lamb.

Mr. Kay: I didn't claim that there was any impeaching question asked about that [230] conversation.

Mr. Baskin: Well, he should connect up some way this conversation with the defendant and in this case.

The Court: Will you repeat the question, Miss Maynard?

Court Reporter: "Q. Calling your attention to the month of November or December in the fall of 1949, last year that is, did you have any conversation with John Roger Lamb about fishing in the, about fishing out at Boca de Quadra during the summer of 1950?"

The Court: Well, it isn't the purpose to connect

(Testimony of William N. Tatsuda.)

the defendant up with it exactly, as I understand it. It is merely to show the disposition of the witness Lamb, and the only objection that could be made to it perhaps is——

Mr. Baskin: What he means is that he is just impeaching the witness Lamb? If so, he certainly didn't lay the predicate.

The Court: Well, no, it isn't impeaching the witness Lamb. It is showing his disposition to do what is claimed he did. Now, as I say, the only objection that could be made to that is that it is too remote, and I don't think it is too remote if it is last November or December. Objection is overruled.

Mr. Baskin: I, of course, submit to the ruling of the Court.

Q. You may answer the question, Mr. [231] Tatsuda.

A. Well, I don't understand that exactly; what you meant by fishing in 1950.

Q. During the coming season. Did he discuss with you at that time anything concerning fishing during the coming season?

A. The only thing he said to me at that time was that if he got the same job next year that he would work it in a different manner.

Q. Did he then discuss with you in the same conversation at the same time and place, with reference to the statement that you have just made, same thing that he had been doing during the summer, the fishing season of 1949?

(Testimony of William N. Tatsuda.)

A. Well, I understood from what he said that he had been selling fish out of Boca de Quadra that summer of 1949.

Mr. Baskin: Your Honor, I object to that as being too remote and irrelevant and immaterial.

The Court: I am inclined to think that the fact that he was selling fish, if he was selling fish, in 1949 would not have a tendency to prove that he would induce or entrap somebody else in 1950.

Mr. Kay: Coupled with what has just been said, with what this witness said previously, that is—may I ask the witness to repeat what he then followed up by saying?

The Court: Yes; you may pursue it a little further.

Q. What did he then say after he had revealed what he had been doing during 1949? [232]

A. Well, he said that there was too much talk going around now so that he was going to work it differently next season if he got the same job back. He went on to say that instead of letting anybody come in that he would just have one or two boats working in there and——

Mr. Baskin: I am going to object to that, your Honor, as being too remote. It is immaterial. It is hearsay, and it is not connected with this case, and ask the Court to instruct the jury to disregard it.

The Court: As I see it, your objection goes to the weight of the testimony rather than its admissibility. You can argue of course that the fact that the witness Lamb was willing or planned to sell

(Testimony of William N. Tatsuda.)

fish, if so or if such is the truth, is no evidence that he would coerce or induce somebody to enter into an arrangement with him, so, as I say, your objection merely goes to the weight it seems to me rather than its admissibility, and, therefore, the objection is overruled.

Q. At that time, Mr. Tatsuda, were you interested in any fishing vessel?

A. Yes. I was half owner of the Rolling Wave at that time.

Q. When had you purchased that half interest in the Rolling Wave?

A. That was in September of 1949.

Q. A month or two prior to this conversation, was it not? [233] A. That is about right.

Q. Now, calling your attention to sometime early in the month of June, 1950, this year, did you have any conversation with John Roger Lamb on the same subject, fishing in the closed waters of the Boca de Quadra, at about that time?

A. Yes, I did.

Q. Can you tell the Court and jury, please, approximately the date that conversation occurred if you can recall?

A. Well, it was the early part of June as I remember. He came into the store and said that he was rehired again as the stream watchman at Boca de Quadra, and he went on to say that usually there is an early run of sockeyes there that starts coming in from about the middle of June, and he wanted me to send my boat down there to fish the sockeyes out of the stream.

(Testimony of William N. Tatsuda.)

Q. And at that time did he say anything about—what, if anything, did he say about the money that might be made on such a venture?

A. Well, he said——

Mr. Baskin: That is asking a leading question, and I object to it.

Mr. Kay: I said, "what, if any"—"if any."

The Court: Objection overruled.

A. He said that if he had a boat down there last year he would have made a young fortune; I believe that is what he [234] said, a young fortune; and that this year he was trying to get a boat lined up to go down and fish the stream during that time before the regular season opened up.

Q. What, if anything, did you reply to John Roger Lamb at that time, Bill?

A. I told him that I didn't think I would be interested in that kind of a proposition, well, because it is pretty dangerous; there is no market, need to look for a market, and then our boat wasn't ready either. The boat had to be fixed up. It wasn't all ready to go out fishing.

Q. Now, do you recall anything else that was said in that conversation, or is that substantially the gist of it?

A. That is about all I can recall on that conversation.

Q. Now, calling your attention to an incident about a month later, sometime, either July 10th or 18th, sometime during the early or middle part of July, 1950, did you on or about that date or that

(Testimony of William N. Tatsuda.)

time in Tatsuda's grocery store in the City of Ketchikan in the presence of Joe Patterson, yourself, John Roger Lamb, engage in a conversation with John Roger Lamb in which he made substantially the following statements, first that he was working or was stream watchman out there for the Fish and Wildlife Service, out at Boca de Quadra; did he say substantially that?

A. Yes, he did.

Q. And did he say in the same conversation at the same time [235] and same place and in the presence of the same persons that "There is a lot of money to be made out there this year" that "I made a lot of money out there last year"? Did he say that? A. Yes, he did.

Q. And did he say, again in the same conversation, the same time, same place, same persons present, that "I am only going to work with one or two boats this year instead of letting everyone in like I did last year"? Did he say substantially that?

A. Yes, he did.

Q. And did he make substantially the following statement during the same conversation, the same time, same place and in the presence of the same persons, yourself and Joe Patterson, "Why don't you fellows bring the Rolling Wave down there and fish the creeks, and we will all make some money"? Did he say substantially that?

A. Yes, he did.

Q. And did he furthermore in the same conversation at the same time and place and in the

(Testimony of William N. Tatsuda.)

presence of yourself and Joe Patterson say that "There is an early run of sockeyes showing up now, and you could come out and get them right now"? Did he say substantially that?

A. That is right.

Q. Did he say at the same time and place and in the presence [236] of yourself and Joseph Patterson in the same conversation, "You don't have to worry any about getting caught. I have it all fixed"?

A. That is right.

Mr. Kay: Your witness.

Cross-Examination

By Mr. Baskin:

Q. What is your name?

A. William N. Tatsuda.

Q. And you live here in Ketchikan?

A. Yes, sir.

Q. You are part owner of the fishing vessel Rolling Wave? A. That is right.

Q. Who is the other owner?

A. Joseph Patterson.

Q. And then you and Joseph Patterson own it all; is that right? A. That is right.

Q. And then you are partners; is that right?

A. That is right.

Q. You are also partners in another business, aren't you; or are you? A. No; we are not.

Q. You are not? [237] A. No.

Q. Are you a good friend of Patterson's?

A. Yes, I am.

(Testimony of William N. Tatsuda.)

Q. How long have you been a good friend of him? A. Two or three years.

Q. Now, you stated a moment ago, answered questions, that Lamb is supposed to have made some statements to you on or about July 10th or 18th. Now, what day was it that he made those statements to you?

A. I believe it was July 18th.

Q. You think that it was July 18th?

A. That is right.

Q. Are you sure about that?

A. Fairly certain.

Q. You are positive of it?

A. Fairly certain.

Q. You wouldn't be mistaken about it?

A. That is right.

Q. So you know it was on the 18th?

A. That is right.

Q. And now, then, how do you know it was the 18th?

A. I have got some bills here that he came into the store that day to purchase groceries; that is the time that——

Q. Will you just answer the question. You got——

Mr. Kay: He is answering the question. Let the [238] witness finish his answer, Mr. Baskin. You asked the question. Let him answer it.

Q. You know it was on the 18th?

A. That is right.

(Testimony of William N. Tatsuda.)

The Court: Counsel should address themselves to the Court at all times.

Mr. Kay: I apologize to the Court.

Q. And he made those statements to you in the presence of who?

A. Joseph Patterson and myself.

Q. And anybody else?

A. No. Someone was in the store. My dad was in the store, but I don't know whether he heard anything, but I am pretty sure he saw us in there.

Q. When did you know you were going to be a witness in this case? A. Oh, about Sunday.

Q. About Sunday? A. Yes.

Q. Have you talked with anybody about it?

A. Yes, I have.

Q. Who did you talk with? A. Mr. Kay.

Q. When? A. Sunday.

Q. Did you talk with him during the noon hour? [239] A. Yes, I did.

Q. And did he go over with you these questions he just asked? A. Yes, he did.

Q. And that is the first time you knew that you were going to be asked these questions?

A. That time when he asked me downstairs?

Q. No. I asked you, today at noon is that the first time you knew you were going to be asked these questions? Answer that. A. Yes.

Q. Yes or no? A. Yes.

Q. And your answer is "Yes"?

A. That is right.

(Testimony of William N. Tatsuda.)

Q. And you went over that with Mr. Kay today at noon? A. That is right.

Q. Have you ever been convicted of a crime?

A. No.

Q. You are interested in the outcome of this case, aren't you? A. Yes, I am.

Mr. Baskin: No further examination.

Redirect Examination

By Mr. Kay:

Q. What is your interest in the outcome of the case, Bill? [240]

A. I am part owner of the boat, and they have a suit against the boat, I understand.

Q. Would your interest in this case cause you to tell any falsehoods from the witness stand?

A. No, I wouldn't.

Q. Did I advise you that all I wanted you to do was tell the truth when I asked you these questions?

A. That is right; exactly.

Mr. Kay: That is all.

The Court: Did you tell the defendant anything about this proposal that Lamb made to you early in June?

A. Early in June? Yes, I believe I did.

The Court: What did he say?

A. He said he didn't want to have anything to do with it.

The Court: Did you make any counter proposal to Lamb, for instance that he should see somebody else, or anything of that kind?

(Testimony of William N. Tatsuda.)

A. No, I didn't.

The Court: Did you tell anybody else besides the defendant about this proposal of his?

A. No, I don't believe I did.

The Court: Well, you knew he was a dishonest officer from what he said?

A. That is right.

The Court: That is all. [241]

Mr. Baskin: I would like to ask him a question, may it please the Court.

Recross-Examination

By Mr. Baskin:

Q. After Lamb made his proposal to you did you advise the Fish and Wildlife agents of this conversation he had with you either in December, 1949, or June, 1950, or July, 1950? A. No.

Mr. Kay: I object to the question as irrelevant.

The Court: Objection overruled.

Q. Did you advise any United States Marshal or any other officer? A. No, I didn't.

Mr. Baskin: No further examination.

Redirect Examination

By Mr. Kay:

Q. You said that you were fairly sure it was July 18th? A. That is right.

Q. Do you have any reason, any tangible evidence that it was July 18th on which you talked with Lamb? A. I have.

(Testimony of William N. Tatsuda.)

Q. What is that? [242]

A. I have bills here that he came into the store to get groceries.

The Court: Well, is it material to fix the date?

Mr. Baskin: No, it isn't, your Honor, and I object to it.

Mr. Kay: Certainly it is, your Honor. Mr. Lamb denied that he was in Tatsuda's grocery store.

The Court: If he was a customer of the store, he was probably in there frequently so that, unless you claim that it is material to fix the date of this particular conversation, why——

Mr. Kay: They seem to feel it was intended to reflect on his veracity, on the veracity of the defendant, that I couldn't fix the date exactly. Now we have some evidence to fix the date, and furthermore Lamb testified, to my recollection, that he was not in the store, that his wife went in and got the groceries.

The Court: On the other hand, whether he was in there on the 10th or 18th, it seems would be immaterial, and your witness' testimony stands that he was in there on one or the other of those dates.

Mr. Kay: Yes, sir.

(Witness excused.) [243]

JIMMY K. TATSUDA

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Kay:

Q. Mr. Tatsuda, will you please state your name to the jury please? A. My name?

Q. Yes, sir. A. Jimmy K. Tatsuda.

Q. Where do you live, Mr. Tatsuda?

A. Down on Stedman Street.

Q. Is that in Ketchikan, Alaska?

A. Yes; Ketchikan, Alaska.

Q. And how long have you lived in Ketchikan, Alaska, sir? A. Forty-five years.

Q. Forty-five years? A. Yes.

Q. You are the father of William Tatsuda who just testified in this case? A. Yes.

Q. Are you also the proprietor of Tatsuda's grocery store here in town? A. Yes.

Q. Are you acquainted with the defendant, Joseph C. Patterson, seated over at the defense table, Mr. Tatsuda? [244] A. Yes.

Q. And do you also know John Roger Lamb? He is not in the courtroom. Do you know John Lamb? A. Yes.

Q. How long have you known John Lamb?

A. About four years.

Q. And does he shop at your market?

A. Yes.

Q. At your store? A. Yes.

(Testimony of Jimmy K. Tatsuda.)

Q. Mr. Tatsuda, I will ask you if you recall an occasion in the month of July, 1950, that is this year, last July, on which your son William Tatsuda, Joseph C. Patterson and John Lamb were talking together in the back of your store?

A. That is right.

Q. Do you recall that occasion? A. Yes.

Q. Did you hear any of the conversation or did you just observe them talking? A. No.

Q. You didn't hear any of the conversation?

A. No.

Mr. Kay: That is all. Your witness. [245]

Cross-Examination

By Mr. Baskin:

Q. Mr. Tatsuda, you don't know the date that you saw them in there talking?

A. I don't know what day; sometime in July, I believe.

Q. What room was it you saw them in—well, let's see——

Mr. Baskin: No further examination.

The Court: Is that the only time you saw them there, Mr. Tatsuda?

A. I saw them couple times, my boy and John Lamb, and the last time I see Patterson and John and my boy, the three together at the other side of the room.

The Court: You saw them there twice then?

A. Yes; twice or three times. I don't remember very good.

(Testimony of Jimmy K. Tatsuda.)

Redirect Examination

By Mr. Kay:

Q. Joe Patterson was only there once, is that right, Mr. Tatsuda, that you remember that there were the three of them? A. Yes.

Recross-Examination

By Mr. Baskin:

Q. Have you discussed this case with the defendant? [246]

Mr. Kay: The defendant is Joe Patterson.

Q. Have you discussed this case with Joe Patterson? A. I don't know what you mean.

Q. Have you talked with Joe Patterson about this case for which he is on trial? Did you talk with the defendant Joe Patterson about this case for which he is on trial now?

A. I just come in and see. You people ask me what I see. I see it. I see them together one time.

Q. Well, I am asking the question, have you talked with Joe Patterson about this case for which he is now on trial? A. (No response.)

Q. You know the defendant over here, Joe Patterson, don't you? A. Yes.

Q. Have you talked with him about this case? Answer that. A. No.

Q. You haven't talked with him?

A. Well——

Q. When did you talk with him?

A. You mean when? What?

(Testimony of Jimmy K. Tatsuda.)

Q. You know that Joe Patterson is charged here with bribery, don't you, with paying a game agent or Fish and Wildlife agent to let him fish?

A. I don't know whether he paid or not. I never know that.

Q. When did you know you were going to be a witness in this [247] case? When did you know that you were going to be called up here in this courtroom and testify right here?

A. I don't understand what you say.

Q. When—you were told, weren't you before you came in here that you would be a witness in this case? You know, as you testify here, you are a witness; you are a witness for the defendant, don't you? A. Yes.

Q. And you testified in his behalf; you know that, don't you? A. I don't know.

Q. You testified as a witness here, didn't you?

A. Yes.

Q. And now, then, when did you know that you were going to be called by the defendant Joe Patterson to testify here today?

A. I don't know when he call; I don't know nothing about it.

Q. Well, I know; but somebody talked with you about it, didn't they? A. No.

Q. Did you just voluntarily come in here?

A. No.

Q. You didn't?

A. He just call me; that is all.

Q. Who called you?

(Testimony of Jimmy K. Tatsuda.)

A. The gentleman here. [248]

Q. What gentleman?

Mr. Kay: I have never met Mr. Tatsuda. I think I can explain it. Did Billy ask you to come down here? Did Billy tell you that I wanted you to come down here?

A. Billy, yes; he told me.

Mr. Kay: All right.

Q. Who is Billy? A. My boy.

Q. And when did he tell you to come down here?

A. This morning.

Q. This morning? A. Yes.

Q. And that is why you came? A. Yes.

Q. Do you know the defendant over here? Do you see Joe Patterson in the courtroom?

A. Yes.

Q. Which one is he?

A. He is second; the middle chair there.

Q. Now, has he talked with you about this case?

A. No.

Q. Did he talk with you about the fact that he and your son and John Lamb were in your store about July, 1950? A. No, I don't think so.

Q. Did Billy talk with you about it? [249]

A. No.

Q. Did anybody talk with you about it?

A. No.

Q. Your are sure of that? A. No.

Q. Well, what did Billy tell you when he told you to come up here as a witness?

(Testimony of Jimmy K. Tatsuda.)

A. Billy told me to tell everything true. I tell you everything true now.

Q. You mean Billy told you to tell everything that was true? A. That is right.

Q. You didn't know what you were going to say? A. No.

Q. And you don't know now either, do you?

Mr. Kay: I ask that that remark be stricken, and the United States Attorney be admonished.

The Court: Well, that last remark will be stricken because of the difficulty the witness has with the English language apparently.

Redirect Examination

By Mr. Kay:

Q. Mr. Tatsuda, had I ever seen you before I opened that door for you just a minute ago?

A. Yes. [250]

Q. When did I ever see you?

A. I never see you before.

Q. You never saw me before in your life?

A. No.

Q. All right.

The Court: Well, Mr. Tatsuda, did anybody tell you, your son or anybody else, what they were going to ask you up here today, what questions they would ask you here today? Did anybody tell you that?

A. No.

The Court: You didn't know what questions

(Testimony of Jimmy K. Tatsuda.)

anybody was going to ask you when you came and sat in this chair; is that correct?

A. My boy tell me this morning, he says, "He might call you in the courthouse. Tell everything true." I tell you everything true now.

The Court: Well, did anybody ask you what you knew about this before they called you?

A. I know something is trouble.

The Court: That is all.

Mr. Baskin: No further examination.

Mr. Kay: That is all. Thank you, Mr. Tatsuda.

A. Can I go home now?

Mr. Kay: Yes, sir.

(Witness excused.) [251]

CHESTER O. KLINGBEIL

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Kay:

Q. Would you state your name please to the jury? A. Chester O. Klingbeil.

Q. Where do you live, Mr. Klingbeil?

A. I live at Stedman Street.

Q. Is that in the City of Ketchikan, Alaska?

A. Yes, sir.

Q. Are you acquainted with—how long have you lived here in Ketchikan?

A. About thirty years.

(Testimony of Chester O. Klingbeil.)

Q. And I will ask you if you are acquainted—what is your occupation?

A. Longshoreman and fisherman.

Q. Are you acquainted with John Roger Lamb?

A. Yes.

Q. How long have you know John Lamb?

A. Oh, three or four years. I worked longshoring with him.

Q. Calling your attention to a day in early June of this year, 1950, possibly about June 7th, I will ask whether or not you had a conversation at that time with John Lamb? A. I did.

Mr. Bailey: I object to the question, your [252] Honor.

Mr. Kay: That is an introductory question. I am going to ask the whole question.

The Court: Objection overruled.

Q. You may answer that question.

A. Yes. I talked to John Lamb, or John Lamb came and talked to me in Ed and Joe's Pool Room.

Q. All right. Let me ask you this question. In this conversation that you had with John Roger Lamb at Ed and Joe's Pool Room, or did you have a conversation with John Roger Lamb at Ed and Joe's Pool Room sometime in early June, possibly June 7th or thereabouts, of 1950, at Ketchikan, Alaska, in which no other persons being present except yourself within hearing of the conversation, in which John Roger Lamb made the following conversation—did you have such a conversation, first? A. Yes.

(Testimony of Chester O. Klingbeil.)

Q. Now, at that time and place in the course of that conversation did John Roger Lamb inform you or state substantially that he had just gotten word of his appointment as stream watchman in the Boca de Quadre for the 1950 fishing season?

A. Yes; that is right.

Q. And did he in the course of the same conversation at the same time and place state substantially that "There is an early run of sockeyes down there"? [253] A. Yes.

Q. And did he at the same time and place and in the course of the same conversation say to you, "Why don't you come down and get them, and we can make some real money this season"?

Mr. Baskin: Your Honor, I am going to object to this question and ask that the witness be requested to state the conversation himself rather than counsel asking the witness——

Mr. Kay: I specifically asked the impeaching question.

Mr. Baskin: You didn't lay the predication for it.

Mr. Kay: I asked the impeaching question of John Roger Lamb this morning, the very identical question.

The Court: I thought that he did lay the foundation for it with the witness Lamb but, if you contend he did not, you will probably have to refer to the record. Do you contend that no such foundation was laid?

(Testimony of Chester O. Klingbeil.)

Mr. Kay: You say I didn't ask such a question of Lamb this morning?

The Court: I told him to put it in writing, and he has got it, I suppose, there.

Mr. Kay: I have it and read it to him.

Mr. Baskin: Maybe I am mistaken. I know he asked a question similar to it yesterday, and it was improperly laid [254] at that time; I am positive of that.

The Court: Well, he laid the foundation this morning.

Mr. Baskin: Very well.

Q. Well, now, where were we? During the course of the same conversation at the same time and place, the same persons being present, did John Roger Lamb state substantially to you, "Why don't you come down and get them, and we can make some real money this season"?

A. Yes; that is right.

Q. And at the same time and place, at Ed and Joe's Pool Room, Ketchikan, Alaska, Territory of Alaska, the same conversation, the same persons being present, did he make substantially the following statement: "We can work together, Chester, this summer fishing the creeks"?

A. Yes; that is right.

Q. Now, I will ask you if you had another conversation with John Roger Lamb on or about June 20th at the Thomas Basin Dock, no other persons being present except yourself and John Roger Lamb? A. That is right.

(Testimony of Chester O. Klingbeil.)

Q. And I will ask you if on that date at that place in the conversation with you John Roger Lamb made substantially the following statement: "Come on down to Boca de Quadre and fish during the closed season"? Did he say substantially [255] that?

A. That is the way he said it, exactly.

Q. Did he say substantially, "There is no chance of getting caught. I have got it fixed"?

A. That is right.

Q. And did he later in the same conversation say, "Well, if I do get caught, I can always turn State's evidence like that guy up at Red Fish Bay"?

A. That is the truth.

Mr. Kay: No further questions.

Cross-Examination

By Mr. Baskin:

Q. Are you a fisherman, Mr. Klingbeil?

A. Yes, sir.

Q. And you have known John Roger Lamb, you say, about three years?

A. About three years, I guess.

Q. You had a conversation with him about June 7th, was it?

A. About June 7th or thereabouts; I don't know the exact date.

Q. Well, was it before June 7th? A. No.

Q. Do you think it was?

A. It was after he was reinstated in the Fish and Wildlife.

Q. You know it was? Were you present when

(Testimony of Chester O. Klingbeil.)

he was reinstated [256] in the Fish and Wildlife?

A. No.

Q. Then you don't know of your own knowledge that it was at that time, do you?

A. He come and told me so.

Q. You mean he told you he had been reinstated?

A. That is right?

Q. And what day was that?

A. I don't remember that.

Q. You don't remember? A. The date.

Q. Well, how is it that you remember so well what he said to you? Now, tell the jury just what you have just testified in answer to this counsel's question? What did he say to you there at Ed and Joe's Pool Room?

A. He said for me to come down there to Quadra and fish, that he had it all ready to go and he wanted me to come down.

Q. Is that all he said?

A. It was quite a long conversation. I don't remember it all. He wanted me to come down there.

Q. And that is all he wanted you to do?

A. And fish.

Q. Fish? Where?

A. And could make good money down in Quadra; that he was going to be the stream watchman at Quadra. [257]

Q. Well, it is not illegal to fish in Quadra, is it?

A. That is right?

Q. So it was proper for you to go to Quadra and fish, wasn't it? A. That is right.

(Testimony of Chester O. Klingbeil.)

Q. And in fact that is what you had in mind doing, wasn't it?

A. Well, this was before the season he wanted me to go down.

Q. I know; but he asked you to go down and fish in Quadra, didn't he? A. That is right.

Q. And you expected to go down in Quadra and fish, didn't you? A. I expected to.

Q. Now, when did you know you were going to be a witness in this case?

A. I didn't know until after this case came up.

Q. I asked you, when did you know you were going to be a witness?

A. I didn't know until a couple days ago that I was going to be a witness.

Q. When was that?

A. I don't exactly remember.

Q. What day was it?

A. I told them I would go up and testify to the facts.

Q. Who did you tell that to? [258]

A. I told Joe Patterson that——

Q. You mean he asked you to come and testify?

A. He did not.

Q. Well, you just said that you told him that you would? A. I told him that I would.

Q. Then he didn't ask you to come up and testify? A. No; he did not ask me.

Q. You voluntarily told him you would come up and testify? A. That is correct.

Q. Now, then, tell the jury whether or not you

(Testimony of Chester O. Klingbeil.)

ever told a Fish and Wildlife agent of this conversation you had with Lamb on or about the 7th of June, 1950?

A. I did not talk to any Fish and Wildlife agent.

Q. Did you ever tell a United States Marshal?

A. No.

Q. Or any other law enforcement officer?

A. No.

Q. You volunteered and told the defendant that you would testify in his behalf, didn't you?

A. That is right.

Q. Now, then, when did you talk with Mr. Kay about these questions that he just asked you?

A. A couple nights ago.

Q. A couple nights ago?

A. And at noon today. [259]

Q. And at noon today? A. That is right.

Q. Did he have them written out for you a couple nights ago? A. No.

Q. Did he have them written out for you today?

Mr. Kay: Your Honor, may I inquire if the United States Attorney is suggesting, as he apparently is, to this jury that I am coaching the witnesses with written questions?

Mr. Baskin: I am not.

Mr. Kay: If he is, I resent it, and I would like to have his remark stricken.

Mr. Baskin: I can ask this witness when he discussed it with this counsel and whether or not he had those questions written out for him to look at. I am entitled to show that.

(Testimony of Chester O. Klingbeil.)

The Court: Yes, except that the question of course is susceptible of being construed as telling him what the conversation was. But nevertheless you can ask him whether or not he saw the questions written out.

Mr. Baskin: Very well.

Q. Those questions that counsel asked you, did you see them written out? A. I did not.

Q. You didn't see counsel or anybody else write them; is that right? [260]

A. No; I didn't see him write them; no.

Q. No. But did you see them, as they were written and as they were asked you, during the noonhour today?

A. I have never seen the piece of paper; I have seen it, but I never read it.

Q. Did counsel read the questions to you during the noonhour?

A. He read them to me; yes, sir.

Q. During the noonhour. And he told you then you would be asked those questions, didn't he?

A. That is right.

Q. What is your full name again?

A. Chester O. Klingbeil.

Q. Chester O. Klingbeil?

A. That is right.

Q. Tell the jury whether or not you were the same Chester O. Klingbeil, that is K-l-i-n-g-b-e-i-l, in the case of the United States of America vs. Chester O. Klingbeil in the United States Commis-

(Testimony of Chester O. Klingbeil.)

sioner's Court at Ketchikan, Alaska, on or about November 19, 1947.

A. In the case of the time I was arrested with hunting without a license?

Q. That is correct.

A. Correct. I hunted with the Fish and Wildlife Service; yes.

Mr. Baskin: May it please the Court, I would like to introduce in evidence the judgment and conviction of Chester [261] O. Klingbeil in the United States Commissioner's Court at Ketchikan, Alaska, November 19, 1947.

The Court: Do you wish to look at it?

Mr. Kay: I would always prefer to look at Mr. Baskin's exhibits.

Mr. Baskin: You are perfectly welcome to read anything I produce, sir.

Mr. Kay: No objection.

The Court: It may be admitted and marked.

Clerk of Court: The instrument has been marked Plaintiff's Exhibit No. 6.

Mr. Baskin: Ladies and gentlemen of the jury, Plaintiff's Exhibit No. 6 is a judgment and conviction of Chester O. Klingbeil for hunting without a license on November 19, 1947, and shows that he paid a fine of thirty-five dollars. No further examination.

(Testimony of Chester O. Klingbeil.)

Redirect Examination

By Mr. Kay:

Q. Chester, at the time I asked you these questions, at the time I first talked to you, isn't it a fact that I told you all I wanted you to do as a witness was tell the truth? A. That is right.

Q. And that is all you have told? [262]

A. That is all I have told.

Mr. Kay: That is all.

(Witness excused.)

ROLAND D. LINDSEY

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Kay:

Q. Would you state your full name to the Court and jury please, Mr. Lindsey?

A. Roland D. Lindsey.

Q. You sometimes have a nickname of Blackie?

A. That is right.

Q. Where do you live, Mr. Lindsey?

A. In Ketchikan.

Q. How long have you lived here in Ketchikan, Alaska? A. About thirteen years.

Q. And what is your occupation, sir?

A. Fisherman.

Q. How long have you been a fisherman?

A. Twenty years, I guess.

(Testimony of Roland D. Lindsey.)

Q. Are you acquainted with the defendant in this case, Joseph C. Patterson? A. I am.

Q. How long have you known Joe [263] Patterson? A. About five or six years, I would say.

Q. And are you acquainted also with a gentleman here in town by the name of John Roger Lamb?

A. I am.

Q. How long have you known John Roger Lamb?

A. Approximately two years.

Q. Now, on or about October 25, 1949, do you recall having any conversation with John Roger Lamb in Floyd Dale's machine shop here in the City of Ketchikan with regard to fishing out at Boca de Quadra?

Mr. Baskin: Your Honor, I object to that as being too remote. There should be a limitation somewhere as to when things become material to this issue, and I think that isn't.

The Court: October, 1949?

Mr. Baskin: Yes.

Mr. Kay: About the same time as the first conversation——

The Court: I don't think that is too remote. Objection overruled.

Q. You may answer that question, if you can recall that. A. We did.

Q. Now, was anyone else present during that conversation that would have heard it, if you know or recall?

A. There were two men present, but they couldn't hear it. [264]

(Testimony of Roland D. Lindsey.)

Q. Now, will you state to the Court and jury please, just what John Roger Lamb said to you and what you said to him during the course of that conversation to the best of your recollection?

A. I was in there fixing a part on my boat, and he came in, and we started conversation, and during that conversation he told me that he thought that probably this next year that he would have a better job, possibly as patrolman on one of the boats and that, if there were any chances at all, that he would like to have me go along with him and get fish here and there. He didn't specify any particular place if he was a patrolman. He said that, if he got the same job back as he had the year prior, that he would have a deal down there and he would like to talk to me about it later on.

Q. And was it understood in the course of that conversation that he meant the stealing of fish illegally down at the Boca de Quadra area?

Mr. Baskin: Your Honor, I object to him asking him what Lamb meant.

Q. Well, was it said, or was such a thing stated or inferred during the course of that conversation?

Mr. Baskin: He can't state what Lamb had in mind. I object to the question.

The Court: Well, the question calls for an opinion, [265] and objection to the question is sustained.

Mr. Kay: I had already withdrawn the question, or tried to, your Honor.

The Court: Very well.

(Testimony of Roland D. Lindsey.)

Q. Was it stated by Lamb or inferred by Lamb during the course of the conversation that the deal was to steal fish illegally from the closed waters of the Boca de Quadra? A. Part of it was; yes.

Q. And part of it was to steal them otherwise if he was on a boat; is that right?

A. That is right.

Q. Now, I will ask you if you are also the skipper of the fishing vessel Diamond T?

A. I am.

Q. And did you fish the Diamond T this season, 1950? A. I did.

Q. Now, I will ask you if on or about August 20, aboard the fishing vessel Diamond T, in the vicinity of Cygnet Island in the Boca de Quadra area——

A. I was.

Q. And I will ask you if on that day and at that time and place John Roger Lamb came aboard the Diamond T? A. He did.

Q. Now, I will ask you if on August 20th aboard your fishing vessel, the Diamond T, near Cygnet Island in the Boca de [266] Quadra area in the presence of your cook George Russell you had a conversation with John Roger Lamb in which substantially the following statements were made—did you have such a conversation, first?

A. We had a conversation.

Q. Now, at that time and place and in the presence of the cook George did John Lamb urge you to enter the creek, Humpback Creek, and there engage in fishing in a closed area? A. He did.

(Testimony of Roland D. Lindsey.)

Q. And did he also at the same time and place and in the presence of the same person state to you that there were a lot of fish in there, three or four thousand? A. He did.

Q. And did he at the same time and place and in the presence of the same person state to you substantially that there was a lot of money to be made in there this year? A. Yes.

Q. And did he state at the same time and place and in the course of the same conversation that he was only working with one or two boats this season and not with everybody like he did last year?

A. He did.

Q. And did he at the same time and place and in the presence of the same person state to you that "There is no chance to [267] get caught. I have got it all fixed"? Did he make that statement?

A. He did.

Q. And did he at the same time and place and in the course of the same conversation outline a system of signal lights which he had agreed upon with other Fish and Wildlife agents which would be flashed to warn you of the approach of any other Fish and Wildlife boat? A. He did.

Q. And did he at the same time and place and in the course of the same conversation offer to accept one hundred dollars per thousand fish for such fishing in illegal, closed waters? A. He did.

Mr. Kay: Your witness.

(Testimony of Roland D. Lindsey.)

Cross-Examination

By Mr. Baskin:

Q. Your name is Rollie Lindsey? A. It is.

Q. When did you know you were going to be a witness in this case? A. Sunday afternoon.

Q. Who asked you to be a witness?

A. Mr. Patterson. [268]

Q. Did he ask you, or did you tell him that you would be a witness? A. He asked me.

Q. He did? And you told him you would?

A. I told him I would.

Q. And that was last Sunday?

A. That is right.

Q. Did you talk with him about this case?

A. Certain parts of it; yes.

Q. About what you have just stated?

A. No, I don't believe I did.

Q. But you did talk with him about this case; is that right? A. We did.

Q. But you didn't say anything to him about the statement that you have just related; is that right? A. I did.

Q. You didn't even mention it to him; is that correct? A. I mentioned it; yes.

Q. What did you tell him—strike that a minute. Did you tell him about Lamb approaching you out there on the 20th of August? A. I did.

Q. Did he ask you that, or did you voluntarily tell him that?

A. I voluntarily told him that.

(Testimony of Roland D. Lindsey.)

Q. So you just voluntarily told him that Lamb asked you, told [269] you to fish in Boca de Quadra, the closed waters; is that right?

A. Would you repeat that? I didn't get that.

Q. You told Patterson that Lamb told you you could fish in the closed waters of the Boca de Quadra; is that right? A. That is right.

Q. And you told him then you would be a witness in this case? A. I did.

Q. Did he tell you at that time what he wanted you to testify to? A. No.

Q. He just asked you to be a witness?

A. He asked me to be a witness.

Q. Did you know what you were going to testify to? A. Yes.

Q. What were you going to testify to?

A. I was going to testify that John Lamb had approached me.

Q. And that was all?

A. Tell my story, just what happened in Quadra.

Q. Did you ever talk with counsel, Mr. Kay, here? A. I did.

Q. When did you talk with him first?

A. Sunday afternoon.

Q. Sunday afternoon. Did he tell you what you were to—did he go over these questions with you Sunday afternoon that [270] he just asked you?

A. He asked me my story of what happened down there, and I told him.

Q. But he didn't ask you the questions?

(Testimony of Roland D. Lindsey.)

Mr. Kay: If the Court please, I would like to ask the Court to admonish counsel to please let the witness finish his answers. He is cutting off the end of his answers all the time.

The Court: Well, of course the witness should be allowed to finish his answers whether or not he had finished it and started something else. It is often difficult to object.

Mr. Baskin: All right.

Q. You heard counsel read these questions to you that you answered a while ago, didn't you?

A. I did.

Q. Now, then, did you ever see those questions before you came into this courtroom?

A. No, sir.

Q. Did you ever see any statement of them?

A. I never saw the statement.

Q. Did you talk to counsel during the noonhour?

A. I did.

Q. And is that the first time that he told you that you would be asked those specific questions that he asked you? [271] A. Yes.

Q. Did he go over those questions with you during the noonhour and tell you that you would be asked those questions? A. No.

Q. You mean to tell the jury here that he went over those questions with you and didn't tell you that you would be asked those questions?

A. He told me that there would be questions asked and that I wouldn't have to tell any story due to the change in the case?

(Testimony of Roland D. Lindsey.)

Q. Due to the change in the case?

A. That is right.

Q. In other words, he went over these questions with you and told you what he was going to ask you; is that right? A. No.

Q. Well, he read the questions to you, didn't he, in substance?

A. He just told me he was going to ask me questions, and I wouldn't have to tell a story.

Q. Did he tell you of those specific questions that he asked you just a moment ago?

A. Will you repeat that please?

Q. Did counsel, Mr. Kay, tell you that he was going to ask those questions that he just asked you on the direct examination? [272]

A. He just told me that he was going to ask questions and I would have to answer them.

Q. And did he tell you the substance of those questions? A. No, he didn't.

Q. Didn't he tell you that you would be asked whether Lamb urged you to fish in that closed area?

A. I understood that before.

Q. Oh, you understood that. Did he show you those questions that he was going to ask you?

A. No.

Q. But you knew they were written out, didn't you? A. I knew he had a book.

Q. Of questions that he was going to ask you?

A. Yes.

Q. And he told you that during the noonhour?

A. Yes.

(Testimony of Roland D. Lindsey.)

Q. Is that right? A. Yes.

Q. Now, you stated here that about October 25th, didn't you say about October 25, 1949, you had a conversation with Lamb? A. That is right.

Q. How do you know it was October 25th?

A. On or about October 25th.

Q. You don't know what day it was? [273]

A. I am not positive; no.

Q. You just know it was in October then; is that right? A. That is right.

Q. You don't know whether it was on the 25th or not, do you? A. No.

Q. Then you didn't tell exactly the truth when you said it was on the 25th?

Mr. Kay: Oh, I object to that. That is an unfair insinuation.

Q. Is that right?

Mr. Baskin: I will withdraw the question.

Q. Now, you had a conversation with Lamb on or about, you said, the 25th of October, 1949.

A. Yes.

Q. And it was something, as I remember your testimony, to the effect that he hoped to do a little better during 1950? A. That is right.

Q. Now, then, did you ever report that to the Fish and Wildlife Service? A. No, sir.

Q. Any agent of the Fish and Wildlife Service?

A. No.

Q. Or any other United States Marshal or Federal officer? A. No, sir.

(Testimony of Roland D. Lindsey.)

Q. Territorial officer? [274] A. No, sir.

Q. Now, with regard to the conversation you had with him on August 20, 1950, did you ever report that to a Fish and Wildlife agent or a law enforcement officer? A. No, sir.

Q. You never mentioned it to anyone then except the defendant here, is that correct, and Mr. Kay?

A. That I would say no to.

Q. But you never told an officer of the law or the Fish and Wildlife Service of it?

A. No, I didn't.

Q. Your name is Rollie Lindsey?

A. That is right.

Q. Mr. Lindsey, tell the jury whether or not you were the same Rollie Lindsey in the case of the United States of America vs. Rollie Lindsey in United States Commissioner's Court at Ketchikan, Alaska, on or about July 29, 1940? A. I was.

Mr. Baskin: May it please the Court, I would like to offer in evidence the judgment of conviction. Perhaps counsel would like to see it.

Mr. Kay: Counsel would always like to see it.

Mr. Baskin: You are welcome to, sir.

Mr. Kay: No objection.

The Court: It may be admitted and marked as Plaintiff's [275] Exhibit.

Clerk of Court: The exhibit has been marked Plaintiff's Exhibit No. 7.

Mr. Baskin: Ladies and gentlemen of the jury, Plaintiff's Exhibit No. 7 is a judgment and con-

(Testimony of Roland D. Lindsey.)

viction of Rollie Lindsey in violation of the Act of Congress June 6, 1924, as amended, and regulations thereunder, for the crime of illegal fishing, and on that day was fined forty dollars.

Q. Now, Mr. Lindsey, tell the jury whether or not you are the same Rollie Lindsey who was the defendant in the case of the United States of America vs. Rollie Lindsey in the United States Commissioner's Court at Ketchikan, Alaska, on or about October 15, 1948? A. That is right.

Mr. Baskin: May it please the Court, I have a judgment of conviction I would like to introduce in evidence, and perhaps counsel would like to see it (passing a document to Mr. Kay).

Mr. Kay: No objection.

Clerk of Court: The exhibit has been marked Plaintiff's Exhibit No. 8.

Mr. Baskin: Ladies and gentlemen of the jury, Plaintiff's Exhibit No. 8 is a judgment and conviction of Rollie Lindsey for violating Section 227.9 of the Laws and Regulations for the Protection of Commercial Fisheries in [276] Alaska, Act of June 18, 1926, as amended, for the crime of fishing during a closed season, and the judgment shows that he was fined five hundred dollars and that it was paid. No further examination.

Redirect Examination

By Mr. Kay:

Q. Just a few questions on redirect, Mr. Lindsey.

(Testimony of Roland D. Lindsey.)

In answering some of the questions of Mr. Baskin on his cross-examination you used the expression, "Mr. Kay told me I wouldn't have to tell a story." Now, it is true that when I first discussed this case with you I said that I would ask you questions and you would merely be expected to testify as to the gist of the conversation that took place; is that correct?

Mr. Bailey: It is leading, your Honor. We object to it.

The Court: But it is leading on an introductory or preliminary matter. Objection is overruled.

Q. Is that correct, sir? A. That is.

Q. And that later this noon I advised you that due to the fact that I had to ask an impeaching question I would read certain statements to you and ask you if those statements were made; is that correct? [277] A. That is correct.

Q. And that is what you meant by the expression? A. That is, exactly.

Q. And at no time have I advised you anything other than I expected you to take the stand and merely tell the truth, is that correct, sir?

A. It is.

Mr. Kay: That is all.

Recross-Examination

By Mr. Baskin:

Q. Another question. Then he did read to you those questions which he told you that he would ask; is that right? Then counsel during the noonhour

(Testimony of Roland D. Lindsey.)

did read to you those questions which he asked you here a while ago?

Mr. Kay: I believe that is exactly what he testified.

Mr. Baskin: Well, I am asking the witness to testify.

Q. Answer the question. A. He did.

Mr. Baskin: That is all.

Mr. Kay: That is all.

The Court: Well, now, as a result of these convictions have you got it in for the prosecution?

A. No, sir. [278]

The Court: You don't feel unfriendly to them?

A. I do not.

The Court: That is all.

(Witness excused.)

GEORGE RUSSELL

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Kay:

Q. Would you state your name please?

A. George Russell.

Q. George Russell. And where do you live, George?

A. I live at Mountain Point.

Q. That is near Ketchikan, Alaska.

A. Yes, sir.

(Testimony of George Russell.)

Q. How long have you lived here in the vicinity of Ketchikan? A. Three years.

Q. Are you acquainted with Rollie Lindsey, the gentleman who just left the stand?

A. Yes, sir.

Q. During this summer were you employed in any capacity by Rollie Lindsey?

A. Yes, sir; I was the cook on the Diamond T.

Q. And are you acquainted with a fellow here in Ketchikan by the name of John Roger [279] Lamb? A. Yes, sir.

Q. And you know that he was stationed out in Boca de Quadra as a Fish and Wildlife agent this summer? A. Yes, sir.

Q. Now, calling your attention to about the date of Sunday, August 20th, of this last year, 1950, did you have a conversation, or were you present when a conversation was had between Rollie Lindsey and John Lamb aboard the Diamond T, the Diamond T then being off Cygnet Island in the Boca de Quadra area? A. Yes, sir.

Q. You were present during that conversation?

A. Yes, sir.

Q. And did you hear that conversation or substantially all of it? A. I think so.

Q. Now, I will ask you if at that time and place, aboard the Diamond T, in the presence of yourself and Rollie Lindsey, if John Roger Lamb made substantially the following statements? Did he at that time and place urge Lindsey to enter the

(Testimony of George Russell.)

closed area of the Boca de Quadra and there engage in fishing in the creeks in that area?

A. Yes, sir.

Q. And did he say that "There are a lot of fish in there, in Humpback Creek, or in that area, three or four thousand"? [280]

A. That is the exact words.

Q. And did he say that "There is a lot of money to be made in there this season, Rollie," or words to that effect? A. Yes, sir.

Q. And did he say that "I am working with only one or two boats this season, not everybody that comes in like last year"? A. That is right.

Q. And did he further say at the same conversation, same time and place, same persons being present, that "There is no chance to get caught. I have got it fixed"? Did he make substantially that statement? A. Yes, sir.

Q. And did he explain to Rollie Lindsey at that time and place and in your presence a system of signal lights or signal flashlights which would be done by two other agents of the Fish and Wildlife Service to protect you against the approach of another Fish and Wildlife boat?

A. That is right.

Q. And did he at that time and place and in your presence offer to accept one hundred dollars per thousand fish from Blackie Lindsey for any of these illegally caught fish in the Boca de Quadra?

A. That is the exact words.

Mr. Kay: No further questions. [281]

(Testimony of George Russell.)

Cross-Examination

By Mr. Baskin:

Q. What were the exact words that he stated out there? A. He urged——

Q. No. Just this last statement here; what were the exact words that he said, language stated?

A. He told—he was saying that——

Q. Well, tell me what the exact words were.

Mr. Kay: Well, wait a minute. Don't interrupt him all the time. Let him get started.

Q. What were his exact words now?

A. He said that he would take one hundred dollars for a thousand fish.

Q. What else did he say there?

A. Well, that was all there was to it.

Q. Then that is all he said then?

A. Well, that is all we was talking about.

Q. When did you know you were going to be a witness in this case?

A. Didn't know until this morning.

Q. Who asked you to be a witness?

A. I don't know as anybody did.

Q. Well, did you volunteer to be a witness?

A. That is right.

Q. Who did you volunteer to be a witness [282] for? A. Who did I volunteer for?

Q. Who did you tell you would be a witness in this case?

A. I don't know as I told anybody.

Q. Well, you said you knew you were going to be a witness today, didn't you, this morning, and

(Testimony of George Russell.)

nobody asked you to be a witness? Now, who did you tell that you would be a witness? Anybody?

A. Well, I was asked to be a witness; yes.

Q. Well, who asked you?

A. Rollie Lindsey.

Q. Rollie Lindsey? Is that the fellow you work for? A. That is right.

Q. That was this summer?

A. That is right.

Q. And he was the one that asked you?

A. That is right.

Q. Did anybody else?

A. As far as I know, no.

Q. Well, if they did, you would know, wouldn't you? Either somebody else asked you, or they didn't, and you know that, don't you?

A. That is right.

Q. Well, did anybody else ask you to be a witness? A. That is all.

Q. Just Rollie Lindsey? [283]

A. That is right.

Q. That was this morning? Did you talk with anybody else about it before coming in here on the witness stand? A. Nobody.

Q. Did you talk with Mr. Kay about it?

A. No.

Q. You haven't talked with anybody?

A. No.

Q. Did Lindsey tell you what you were going to testify to? A. No.

Q. Did he tell you that you might be asked ques-

(Testimony of George Russell.)

tions about a conversation with Lamb aboard his boat? A. He told me to tell the truth.

Q. Well, I didn't ask you that question. I asked you, did he tell you that you would be asked questions as to the conversation with John Lamb aboard that boat?

A. Well, that is what the trial is for.

Q. But what did Lindsey tell you this morning?

A. He didn't tell me nothing.

Q. He just asked you to come up and be a witness?

A. That is right. He said, "All you got to do is tell the truth."

Q. Is that all he said? A. That is all.

Q. Anything else? [284] A. That is all.

The Court: Well, did you know what questions you would be asked when you got here?

A. No, sir.

The Court: They came as an entire surprise to you, did they? A. Yes, sir.

Q. Now, you overheard that conversation then about August 20, 1950?

A. Yes; I heard the conversation.

Q. Did you tell any agent of the Fish and Wildlife Service about that conversation?

A. Did I tell anybody?

Q. Yes. A. No, sir.

Q. You didn't tell the United States Marshal?

A. No, sir.

Q. Or any law enforcement officer?

A. (Indicating in the negative.)

(Testimony of George Russell.)

Q. You know the defendant Patterson here, don't you? A. I have seen him.

Q. Here in Ketchikan? A. Yes, sir.

Q. And are you a friend of his?

A. Well, not exactly a friend. I know him when I see him. [285]

Q. Do you want to help him out in this case?

A. Well, I suppose I do.

Mr. Baskin: No further examination.

Redirect Examination

By Mr. Kay:

Q. All that Blackie asked you was just to tell the truth; is that it? A. That is right.

Mr. Kay: No further questions. You may leave the stand.

Mr. Baskin: Well, just a moment.

Recross-Examination

By Mr. Baskin:

Q. You say that Blackie told you to tell the truth? A. That is right.

Q. What did he tell you to tell the truth about?

A. Just about the time that we was there.

Q. You mean, that you were where?

A. Where we was fishing in Boca de Quadra.

Q. You mean, to tell the truth about the conversation with Lamb on or about August 20th?

A. Yes.

Q. Then he did tell you what you were going to testify about [286] then, didn't he?

(Testimony of George Russell.)

A. No, he didn't.

Q. Well, you just said that he told you you would testify about that conversation.

A. He told me to come and tell the truth about the time when the agents come aboard our boat.

Q. When what agents came aboard your boat?

A. Johnny Lamb.

Q. When was that?

A. Well, they come aboard so many times I couldn't keep track.

Q. Well, when did Lindsey say that he came aboard that you would testify about?

A. I don't know when Lindsey said anything about it.

The Court: Well, then, you mean you didn't know what occasion about boarding the boat you were going to testify about until you got here and the questions were asked you?

A. No, I didn't know.

Q. Have you ever been convicted of a crime?

A. Yes, sir, I have.

Mr. Baskin: No further examination.

Redirect Examination

By Mr. Kay:

Q. How long ago was that?

A. About fifteen years ago. [287]

Mr. Kay: That is all.

(Witness excused.)

(Whereupon Court recessed for ten minutes, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; whereupon the trial proceeded as follows:)

The Court: Call your next witness.

WALTER C. MALTSBERGER

called as a witness on behalf of the defendant, being frst duly sworn, testified as follows:

Direct Examination

By Mr. Kay:

Q. Would you state your full name to the jury, Carl? A. Walter C. Maltsberger.

Q. And where do you live, Mr. Maltsberger?

A. Ketchikan, Alaska.

Q. How long have you lived here in Ketchikan?

A. Three years.

Q. Are you acquainted with the defendant in this case, Joseph C. Patterson? A. Yes.

Q. How long have you known Joseph Patterson? A. Four or five years.

Q. Are you acquainted with one of the witnesses in this case, a man by the name of John Roger Lamb, John R. Lamb? [288] A. Yes.

Q. How long have you known John Lamb?

A. Almost four or five years.

Q. Well, now, did you sign on as a member of the crew of the Rolling Wave, owned by Joseph C. Patterson, during the fishing season this year, Mr. Maltsberger? A. Yes, I did.

(Testimony of Walter C. Maltsberger.)

Q. About when did the Rolling Wave leave Ketchikan for the fishing season to the best of your recollection? A. August 14th.

Q. August 14th? A. Yes.

Q. Where did you proceed at that time, Carl?

A. We left town and we went to Boca de Quadra.

Q. And as you entered into the area of Boca de Quadra near Cygnet Island, did anything happen?

A. Yes.

Q. What did happen? Will you tell the jury what did happen at that time?

A. We was about a mile and a half off of the marker, and a speedboat come out, and so it come up and landed right besides of us.

Q. Now, who, if anyone, was on that speedboat?

A. John Lamb.

Q. Anyone else; or was he alone? [289]

A. He was alone.

Q. And what happened then; will you tell the jury?

A. Well, he came alongside of us, and I tied the boat on the side, and he wanted to know if we was going to fish around there, and he said, "There is a lot of money to be made around here," and he wanted us to try it out.

Q. Was that conversation with yourself or with Joseph C. Patterson? A. That was Joe.

Q. And you were on deck at that time and heard part of the conversation? A. Yes.

Q. Now, will you tell the Court and jury just to

(Testimony of Walter C. Maltsberger.)

the best of your recollection what parts of the conversation you heard, if any?

A. Well, he just come on there, and he asked us, he said he wanted to know if we was going to fish around there, that there was a lot of fish showing up. He said it would be a good chance to make a little money there.

Q. Did he have any reference during the conversation to any particular portion of the Boca de Quadra? A. Will you state that again?

Q. Did he have reference to any particular place in the Boca de Quadra? A. Yes. [290]

Q. What place, if any?

Mr. Baskin: Your Honor, I object to that. He should ask the witness what he said without asking him a leading question as to what he was referring to. He can state what Lamb stated, and that should be the question in that form.

The Court: Well, I think it is a matter that a leading question can be asked about. Objection overruled.

Mr. Baskin: Well, it also infers what was in the mind of Lamb, which this witness cannot testify to, and I object to it on that ground.

Mr. Kay: Well, your Honor, please, not as he stated it.

The Court: Objection overruled.

Q. What, if anything, did he say in that regard, Carl, that you recall?

A. The part I recall is that he said there was a lot of fish up there.

(Testimony of Walter C. Maltsberger.)

Q. Up where? A. In Mink Arm.

Q. And did he refer to, if you know, did he refer to a closed area at that time?

A. He said that everything was set. He said everything was O.K. And we run on in and we dropped anchor in an open area.

Q. And what did John Lamb do then, if [291] anything?

A. Well, he left the boat for a few hours, and then he come back.

Q. Now, who was aboard the vessel when he came back, if you recall?

A. Joe Patterson and I.

Q. Where were the rest of the crew?

A. They were out riding around.

Q. In the speedboat? A. Yes.

Q. Skiff? A. Skiff.

Q. Do you recall, where were you at that time, Carl? A. I was down in the galley.

Q. And where was Joe Patterson?

A. He was doing dishes.

Q. And where was John Lamb?

A. He was down in the galley, too, then.

Q. What, if anything, was said between Joe Patterson and John Lamb on that occasion?

A. Well, he come back over after everybody left, and he comes on there, and he sits and talks, and he said, "There is a lot of money there to be got if you just go and get it." Joe said, "Well, I don't like the idea of it," and so he says that everything was

(Testimony of Walter C. Maltsberger.)

fair. He says he got everything fixed so can't be picked up for it or anything. [292]

Q. And did he say anything else that you can recall, that you can recollect?

A. Quite a little bit. He says, telling how much money he made last year there, and he says he paid up all his bills and bought a troller, and he still says he could do better this year if he gets the right guys there and take care of it.

Q. And at that time did Joe Patterson and Lamb agree to anything? A. No, they didn't.

Q. And where did you go then from that area?

A. We pulled anchor the next morning and we left, and he said—the Chris-Craft come aboard of us—he said the Chris-Craft was fixed. I don't know their names. It was two young fellows, and they come aboard and searched all over. I don't know what they was looking for. So we went on to Lucky Cove and fished there all day.

Q. Did you run back into the Boca de Quadra area on the 16th to the best of your recollection?

A. Somewhere in there; yes.

Q. The following day? A. Yes.

Q. And do you recall an occasion when Lamb and one of the fellows on the Chris-Craft pulled alongside of the Rolling Wave? [293]

A. Yes, they pulled alongside, and John said, "Everything is fixed." He introduced us to him, to the tall slim fellow, and said, "We got everything fixed." He said, "You can go in there any time you want now."

(Testimony of Walter C. Maltsberger.)

Q. Did he say anything about the signal lights, do you recall?

A. Yes. He said, "There are three lights there. It would take about an hour, I imagine, from the first one on to the last one."

Q. And do you recall any other conversation, or is that the best of your recollection?

A. That is the best of my recollection right now.

Mr. Kay: Your witness.

Cross-Examination

By Mr. Baskin:

Q. Mr. Maltsberger, when did you know that you were going to be a witness in this case?

A. Oh, quite a few days ago.

Q. Who asked you to be a witness?

A. He said I would be called up any time.

Q. Who asked you to be a witness?

A. Patterson.

Q. That is the defendant over here?

A. Yes. [294]

Q. Did you fish on that boat, the Rolling Wave, during the season of 1950? A. Yes.

Q. And where did you fish?

A. Fished around Boca de Quadra and Lucky Cove.

Q. Did you fish in Boca de Quadra area?

A. Yes.

Q. Did you fish in Mink Arm? A. Yes.

Q. What part of Mink Arm?

(Testimony of Walter C. Maltsberger.)

Mr. Kay: I object to that question, your Honor, unless the witness is advised that he doesn't have to incriminate himself unless he wants to. I think that the Court should admonish or instruct him that he has the privilege of refusing to answer on the grounds that to do so might incriminate him.

The Court: Well, you needn't answer any question that might incriminate you.

A. We fished in the Boca de Quadra. That is a lot of area there.

Q. Did you fish up near Humpback Creek within the markers, that is closed to commercial fishing for salmon? A. Do I have to answer that?

The Court: It all depends on whether you think it might incriminate you. [295]

Q. Would you like to answer that question?

A. No, I wouldn't.

Q. Then you feel you would be incriminated if you would answer it? A. Myself, yes.

The Court: Well, you can't speak for anybody else. You have to speak for yourself.

Q. Then you are not going to answer that question? All right. You testified here that you had a conversation with Lamb, or he had a conversation with Lamb—I mean, Lamb had a conversation with Patterson on or about the 15th? A. No.

Q. What day was it?

A. As far as I can figure, it was the 14th.

Q. Do you know it was the 14th?

A. The day we left Ketchikan.

(Testimony of Walter C. Maltsberger.)

Q. And you know it was on the 14th then?

A. Yes.

Q. So you know the day you left Ketchikan?

A. Yes.

Q. And Lamb went aboard and talked with you; is that right?

A. He didn't come aboard to talk to me. He come to talk to Patterson.

Q. Well, I thought you said you were aboard and heard the conversation? [296]

A. I was. I tied his skiff up there.

Q. But he wasn't talking to you. He was talking to Patterson. Now, what did he say to Patterson while you were—strike that a minute. You said, I believe, that he said, "There is a lot of fish up there in Mink Arm," did he? A. Yes.

Q. Now, have you talked with counsel about your testimony here today? A. With who?

Q. With counsel, Mr. Kay? A. Yes.

Q. Talked with him today about it?

A. Yes.

Mr. Bailey: Just a minute, your Honor.

Q. You were a crew member during the entire fishing season of the Rolling Wave, weren't you, that is, during all the month of August, 1950?

A. From the 14th on; yes.

Q. From the 14th of August on. When did you cease to be a member of the crew?

A. When the season closed.

Q. When did it close?

(Testimony of Walter C. Maltsberger.)

A. It closed at the end of the season. I don't know.

Q. Did you fish on or about the 16th of August, 1950? A. Somewhere in there; yes. [297]

Q. Did you fish in Mink Arm on or about the 16th of August, 1950?

A. I can't answer that one.

Q. Well, do you know whether you fished or not? Don't you? A. I fished in Quadra; sure.

Q. Well, did you fish within the closed waters near Humpback Creek on or about the 16th of August, 1950? A. I can't answer that.

Q. Well, why can't you answer it?

A. Incriminate myself there.

Q. You don't want to answer it then because you will incriminate yourself; is that the reason you don't want to answer that question?

A. Yes.

Q. Tell the jury whether or not you fished within the closed waters of Mink Arm or Mink Bay on or about the 17th of August, 1950.

A. We fished around Quadra all through the week.

Q. I said in the closed area.

A. I can't answer that.

Q. Why can't you answer? You mean that you claim it will incriminate you to answer that question? A. Yes.

Q. And you don't want to answer it?

A. Yes. [298]

(Testimony of Walter C. Maltsberger.)

Q. Tell the jury whether or not you fished as a member of the crew of the Rolling Wave within the closed waters or the area closed to commercial fishing in Mink Arm near Humpback Creek on or about the 19th of August, 1950.

A. Still incriminate myself.

Q. You mean you would incriminate yourself to answer that question? A. Yes.

Q. And, therefore, you decline to answer it, as well as the previous questions I asked you, for that reason? A. Yes.

Q. All right. Were you aboard the Rolling Wave on August 16, 1950?

A. I was on it all the time.

Q. Also on the 17th? A. Yes.

Q. And also on the 19th? A. Yes.

Q. You were a crew member aboard that vessel?

A. Yes.

Q. Now, did you participate in all of the fishing that vessel engaged in on the 16th, 17th and 19th of August, 1950?

A. Yes. If the dates are right, yes.

Q. Then during all of the fishing season of 1950 you were on board the Rolling Wave and you participated in all of the [299] fishing that that vessel and its crew engaged in? A. Yes.

Q. Now, Mr. Maltsberger, you don't want to deny that you fished in the area which is closed to commercial fishing near Humpback Creek of Mink Arm or Mink Bay, do you? A. No.

(Testimony of Walter C. Maltsberger.)

Mr. Kay: You don't have to answer that question if you feel it would incriminate you.

Mr. Bailey: Your Honor, can't we have the objections made to the Court rather than to the witnesses. It seems to me that counsel has been admonished three or four times, and it should be enough for a man of his ability.

The Court: I don't think that the witness needs to fear incriminating himself anyhow. I don't think it can be used against him when he is put here under oath and compelled to testify.

Mr. Kay: It is pointless. He is not on trial anyhow, your Honor. I think it is immaterial, irrelevant and incompetent, and I object to it.

The Court: Well, if it goes beyond the dates involved here, it would be.

Q. Then you don't want to deny—I mean, do you want to deny that you fished—I will reframe the question. Then you don't want to deny that you fished in Mink Arm in the area closed to commercial fishing near Humpback Creek on or about [300] August 16th, 17th and 19th?

A. Still incriminate myself.

Q. The Court hasn't ruled that that is incriminating. Answer the question.

Mr. Kay: Oh, it is for the witness to decide, your Honor.

The Court: Well, it is not entirely for the witness to decide. Will you repeat the question? It has got to have some tendency to incriminate before he can claim the privilege.

(Testimony of Walter C. Maltsberger.)

Court Reporter: "Q. Then you don't want to deny—I mean, do you want to deny that you fished —I will reframe the question. Then you don't want to deny that you fished in Mink Arm in the area closed to commercial fishing near Humpback Creek on or about August 16th, 17th and 19th?"

The Court: Well, I think he has the privilege there.

A. I would just as soon not answer that.

Mr. Baskin: Very well, your Honor.

Q. You don't answer it because you claim the privilege; is that correct? A. Yes.

Q. Tell the jury whether or not you were ever convicted of a crime?

A. Well, I don't know as I have ever been convicted of any crime. I might have been picked up once for being drunk or something like that. [301]

The Court: Were you ever sentenced to pay a fine or go to jail?

A. I have been in jail twice.

Mr. Kay: Were you sentenced or just picked up? A. Just picked up.

The Court: I asked you if you had ever been sentenced to jail or sentenced to pay a fine.

A. I have paid a fine; yes.

Q. You were sentenced to pay a fine?

A. Yes.

Q. Then you were convicted then, weren't you?

A. No. I paid bail money. I didn't have to pay it.

Mr. Baskin: No further examination.

(Testimony of Walter C. Maltsberger.)

Redirect-Examination

By Mr. Kay:

Q. Was that on a charge of disorderly conduct the night before you went into the United States Army? A. Yes.

Q. Or Navy; whatever it was?

A. Army.

Mr. Kay: No further questions.

(Witness excused.) [302]

JOHN F. VAN GILDER

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Kay:

Q. Your name, I believe, is John Van Gilder?

A. John F. Van Gilder.

Q. You are a resident of Ketchikan, Alaska, sir?

A. Yes.

Q. How long have you been a resident of Ketchikan, Alaska?

A. Just over twenty years.

Q. Are you acquainted with the defendant in this case, Joseph C. Patterson?

A. Yes; well acquainted.

Q. How long have you known Joseph C. Patterson? A. Since the spring of 1947.

Q. And have you ever had occasion during the course of your life here in Ketchikan to talk to other people about Joseph C. Patterson?

(Testimony of John F. Van Gilder.)

A. That has happened on several occasions, and——

Q. You don't have to explain at this time, sir. I just want to know if you have talked to other persons about Joseph C. Patterson. A. Yes.

Q. Do you know the general reputation of Joseph C. Patterson in the community in which he lives, Ketchikan, Alaska, for [303] his honesty and integrity? A. Yes.

Mr. Baskin: Your Honor, I don't think that is the proper question. It is not framed according to the law the way it should be framed, as to whether or not he knows it or not.

Mr. Kay: Well, I said, if he knew the general reputation of Joseph C. Patterson in the community in which he lives for honesty and integrity.

The Court: I think that is in the proper form.

Mr. Kay: That is exactly right according to the book. A. Yes.

Q. Will you state to the jury please what that reputation is?

A. Do you want me to state my impression of that, or——

Q. I want you to say what you know of his general reputation for honesty and integrity in this community.

A. Persons I have discussed Joe with have agreed that his——

Mr. Baskin: Your Honor, I object to that. He can give a simple answer.

The Court: Objection sustained.

(Testimony of John F. Van Gilder.)

Q. You should give what they have said regarding their knowledge of him, his general reputation.

A. The very finest.

Q. The very finest. [304]

Mr. Kay: No further questions.

Cross-Examination

By Mr. Baskin:

Q. Mr. Van Gilder, when did you know you were going to be a witness in this case?

A. I was called at one-twenty today.

Q. Today? A. Yes.

Q. Who called you? A. Mr. Patterson.

Q. And asked you to be a character witness?

A. Yes, sir.

Q. And that is the first time you knew about it?

A. Yes, sir.

Q. Now, then, you said you talked with persons about his character, his reputation for honesty and integrity. Who have you talked with?

A. I think the first one I discussed him with was Doctor Cramer.

Q. Is he related to you?

A. Yes, sir; my nephew.

Q. When did you talk with him about it?

A. In the fall of 1947 when Joe was organizing the Boys' Club.

Q. That is the first time? [305]

A. That is the first time I recall.

Q. Have you talked with him any other time about him?

A. I think about two months ago. Yes; about

(Testimony of John F. Van Gilder.)

two months ago we had another discussion of Joe because he had been a patient.

Q. And that is when you talked with him?

A. That is the second time that I recall.

Q. Was that before or after August 19, 1950?

A. It was before there was any trial; I mean anything to do with court proceedings.

Q. And those are the only two times you have ever talked to Doctor Cramer?

A. I don't recall any others.

Q. Now, did you discuss or he discuss his honesty?

A. I would say general integrity; yes.

Q. Well, did you use the words "honesty" and "integrity" when you were discussing that?

A. Yes. "Usefulness" was another word.

Q. You mean in that conversation you and Doctor Cramer mentioned that, his integrity? Did you use the word "integrity"? A. Yes.

Q. Isn't it unusual for a man to, in a conversation, to mention his integrity?

A. Not when it is so apparent. [306]

Q. Is that right? A. That is right.

Q. Then did he mention the word "honesty"; that he was honest?

A. I believe that word was used exactly.

Q. Now, what was the occasion for saying that he was an honest man?

A. Due to his dealings; as I say, we were discussing mostly the Boy's Club and its influence upon the Boy Scouts and similar matters, and then the

(Testimony of John F. Van Gilder.)

discussion came up as to who was running it, why and how.

The Court: But before we go any farther with this, am I to understand that Doctor Cramer is the only one with whom you have discussed his reputation?

A. No, sir.

The Court: Well, who are the others?

A. I can mention Mr. McMillan at the First National Bank, Mr. Murcowski, Frank Hansen of Hansen's Clothing and, I believe, oh, yes, Mr. Zaruba that used to have the pool room.

Q. And in each one of those you discussed his honesty and integrity?

A. I wouldn't say that was all the subject. Usefulness was the main idea. Integrity came into it; yes.

Q. What was the occasion for talking with Mr. McMillan about his honesty and integrity? [307]

A. That was after the arrest had been made; I mean, the case had been started; and we were each regretting that such a thing would come up.

Q. Then that was after he was arrested for bribery; is that correct? A. That is right.

Q. And that is when the subject came up?

A. That is right.

Q. You never talked with him before that occasion, did you? A. Not regarding Joe; no.

Q. Now, what is the other man's name at the bank? A. Murcowski.

(Testimony of John F. Van Gilder.)

Q. Murcowski. When did you talk with him about it?

A. I would say about one week ago or ten days, not over ten days ago.

Q. About ten days ago?

A. Something like that.

Q. And then that was after August 15, 1950, wasn't it? A. That is right.

Q. And who was the other gentleman you talked with about it? A. Frank Hansen.

Q. What was the occasion for talking with him?

A. Again it was at the Veterans of Foreign Wars first. I would say that was over a year ago. It was in 1947, and Frank agreed to go down and help Joe with the Boys' Club, [308] and then from that led into a discussion of Joe and his personality.

Q. And you discussed his honesty and integrity there? A. That is right.

Q. Did he express an opinion, that that was his opinion?

A. He volunteered the information that Joe was about the most useful citizen around that he could find.

Q. Is that right? A. That is right.

Q. How long had Joe lived around here?

A. Since the Spring of 1947. I don't know what month he came here.

Q. Do you know whether or not he operates the 400 Club? A. Yes, sir.

Q. He does? How long has he operated that?

A. I don't remember when it started.

(Testimony of John F. Van Gilder.)

Q. What is the reputation of that 400 Club?

Mr. Kay: I object. It is improper cross-examination. We are not trying the 400 Club.

The Court: But the defendant is connected with it. Objection overruled.

Q. What is the reputation of the 400 Club here in Ketchikan?

A. I have only been there once or twice so I don't know.

Q. I am asking what its reputation is.

A. Well, you are asking me a question that I can't truthfully [309] answer.

Q. Well, what have you heard about it?

A. That it was a good place to eat; that you get fine steaks.

Q. What else did you hear about it? Now, just tell the truth, Mr. Van Gilder. What else did you hear about the operation of the 400 Club?

A. Well, I am trying to recall a time when I heard anything about the operation.

Q. Well, I am asking you, what else did you hear about the reputation of the operation of the 400 Club by Joe Patterson? Now, answer that.

A. I can't answer it because I don't recall ever discussing it with anyone.

Q. Well, then, you don't know then that it is even a restaurant; is that right?

A. I have eaten there.

Q. But you have never discussed its reputation then? A. No.

Q. With anybody? Are you sure of that?

(Testimony of John F. Van Gilder.)

A. I am positive.

Q. You know that the defendant runs that club though, don't you? A. Oh, yes.

Q. Now, then, do you know that the 400 Club has a reputation of being a gambling house or gambling establishment, and [310] that it also has a reputation of being a bootlegging joint or where they sell liquor without a license?

Mr. Kay: I object to the question, the form of the question. The prosecuting attorney is testifying. He should ask, put the question, "Do you know whether or not." He is claiming that it does have such a reputation.

The Court: Yes. It assumes that it has that reputation.

Mr. Kay: I think he should rephrase the question, may it please the Court.

Q. Answer the question.

A. Will you please restate it.

Q. Do you know that the 400 Club has the reputation of selling illegal liquor, without a license, and also as being a gambling establishment?

A. I know that liquor was sold, and I know that there wasn't a license, but I don't recall hearing there was a gambling establishment.

Q. You also know that there has been gambling in that place, don't you? A. Not on my own.

Q. You have heard that, haven't you?

A. I have heard it.

Q. Did you know—let me see these. Now, then, did you know, Mr. Van Gilder, that the defendant

(Testimony of John F. Van Gilder.)

Joseph C. Patterson on [311] September 24, 1948, plead guilty and was convicted in the City Magistrate's Court at Ketchikan, Alaska, for operating a gambling game?

A. I read it in the papers; yes.

Q. You knew that then?

A. Oh; gambling? No. Liquor.

Q. Oh; liquor. I will ask you about that in a minute. Did you know that he was convicted for operating a gambling game on or about September 24, 1948?

A. No. The only one I recall was on a liquor charge.

Q. And then you do know that he was convicted then about September 24, 1948, for selling liquor without a license; is that right? A. I do.

Q. You knew that? A. Yes.

Q. Now, then, did you know that Joe Patterson was arrested, and he was convicted on seven counts for selling liquor without a license in the United States Commissioner's Court at Ketchikan, Alaska, about December 29, 1948?

A. Wasn't that the same case?

Q. No, sir; it wasn't. Did you know that?

A. Well, I must have, but I thought there was one case. I didn't think there was two.

Q. Did you hear or know that he was convicted on one count of [312] maintaining a public nuisance or a gambling establishment in the United States Commissioner's Court at Ketchikan, Alaska, about December 29, 1948?

(Testimony of John F. Van Gilder.)

A. I didn't know what the charge was. I thought it was for selling liquor.

Q. But you know he was convicted for selling liquor and for operating a gambling establishment?

A. I didn't know that gambling was in it. I thought it was liquor purely and simply.

The Court: Well, did you make it a point to ascertain what the reputation of the defendant was after he got into this trouble; was that it?

A. No, sir.

Q. Now, Mr. Van Gilder, did you know that Joseph Cullen Patterson, or the defendant, was arrested by the Police Department of San Diego, California, on or about October 16, 1935?

A. No, sir.

Q. You didn't hear that? A. No.

Q. Did you hear that he was arrested by the Police Department of San Diego, California, on or about October 15, 1937, for battery and disorderly conduct and was convicted? A. No.

Q. Did you hear that the defendant Joseph Patterson was [313] arrested by the San Diego Police Department on or about August 3, 1940, for disorderly conduct? A. No.

Q. Did you hear that on or about September 18, 1940, that Joseph Cullen Patterson was arrested by the San Diego Police Department for being drunk and that he forfeited bail on that occasion?

A. No.

Q. Did you hear that he was arrested as John

(Testimony of John F. Van Gilder.)

Johnson, that is that this defendant here was arrested as John Johnson, by the Police Department of San Diego, California, on or about December 7, 1941, for maintaining gambling? A. No.

Q. Did you hear that Joseph C. Patterson was arrested by the San Diego Police Department on or about February 13, 1942?

A. I knew nothing of his record below.

Q. Did you hear that Joseph C. Patterson was arrested——

Mr. Kay: The witness just said that he knew nothing about his record below.

Mr. Baskin: Well, I can ask the witness if he heard these things.

The Court: Well, of course, if he says he knows nothing about it, it is futile to ask him, I suppose.

Q. Did you hear that——

Mr. Kay: I object to any further question along this [314] line. He said that he knew nothing of his record below. I think he is foreclosed.

The Court: Well, unless it is for the purpose of predicating another question on it; I don't know whether he wants to embody all this in another question and attempt to sum up the witness' testimony in one fell swoop or not. If you don't, why there is no use of going into it.

Mr. Baskin: I am going to ask him another question following all of this, may it please the Court.

Mr. Kay: Much of these things are merely, does he know whether he has ever been arrested.

(Testimony of John F. Van Gilder.)

Mr. Baskin: I am asking if he had heard of it. That is all.

The Court: Well, of course, as far as reputation is concerned, he is not limited to conviction.

Mr. Kay: But this all relates to his reputation in San Diego, California, and has nothing whatever to do with his reputation in Ketchikan, Alaska, which is the question.

The Court: Well, it may be that in one sense it hasn't anything to do with it because it perhaps wouldn't tend to establish reputation down there, but nevertheless it is proper cross-examination.

Mr. Kay: It is too remote, your Honor, the further objection with regard to any reputation in Ketchikan, Alaska, at the present time. [315]

The Court: It is not too remote under the Mitchelson case and that seems to be the case that governs here. In other words, you can go back a considerable distance or in a considerable time to inquire whether the witness has heard something that would tend to weaken his testimony or his conclusion. He may be asked whether in view of that he still thinks the reputation is as he testified.

Q. I will ask you the question, did you know, did you hear that Joseph C. Patterson was arrested by the Police Department of San Diego, California, October 2, 1942, for vagrancy and that he forfeited the bail? A. No.

Q. Did you hear that Joseph C. Patterson was arrested by the Police Department at San Diego,

(Testimony of John F. Van Gilder.)

California, December 30, 1942, for maintaining gambling and that he forfeited a hundred dollars bail?

A. No.

Q. Did you hear that Joseph Cullen Patterson on or about February 27, 1943, was arrested by the Police Department of San Diego, California, on a fugitive warrant from Manhattan Beach, California? A. No.

Q. Did you hear that Joseph Cullen Patterson was arrested August 25, 1943, by the Police Department at San Diego, California—— [316]

A. No.

Q. For soliciting gambling and that he was convicted in the Police Court?

A. I didn't know that.

Q. Did you hear that he was arrested by the San Diego Police Department of California, on or about September 18, 1943, for vagrancy?

A. No.

Q. Now, Mr. Van Gilder, after knowing that the defendant was convicted in the United States Commissioner's Court for maintaining a common nuisance, a gambling establishment, and also on seven counts of selling liquor without a license, and for, convicted in the Municipal Court at Ketchikan for selling liquor without a license and for also operating a gambling game, do you want to change your testimony? A. Not a bit.

Q. You still believe——

A. I still believe in Joe Patterson. Period.

(Testimony of John F. Van Gilder.)

Q. That is your opinion; is it?

A. That is right.

Q. Now, do you still think that that is the reputation of Joe Patterson here in this community?

A. With anyone that knows Joe personally; yes.

Q. That is their opinion of his reputation; is it? [317] A. It couldn't help be otherwise.

Q. With all of these convictions for gambling and selling liquor? You stand on that?

A. Yes, sir.

Mr. Baskin: No further examination.

Redirect Examination

By Mr. Kay:

Q. A number of these conversations which you mentioned on Mr. Baskin's cross-examination occurred after Joe's convicition in 1948 for selling liquor, did they not, Mr. Van Gilder?

A. Yes, they did.

Q. And they still expressed opinion of his honesty and integrity being the finest, did they not?

A. That is right.

Q. And——

Mr. Baskin: Your Honor, I object to that as being after the defendant's arrest.

Mr. Kay: After the conviction, I said, in 1948. I said that very clearly.

Mr. Baskin: I am sorry. I will withdraw the objection. I thought you meant something else.

Q. And Mr. Van Gilder, you heard reference to the 400 Club as a gambling club, of gambling occur-

(Testimony of John F. Van Gilder.)

ring there. Have you heard of gambling occurring in the Elks Club in the City [318] of Ketchikan?

Mr. Baskin: I object to that, your Honor. It is irrelevant.

The Court: Yes; unless you show the defendant is connected with the Elks Club in its operation some way. The objection is sustained.

Mr. Kay: Would the same objection be made if I asked him if gambling occurred at the Vets' Club in the City of Ketchikan?

Mr. Baskin: Yes. I object to any——

The Court: I should think so.

Mr. Kay: Well, then I won't bother. That is all, Mr. Van Gilder.

The Court: Well, now, Mr. Van Gilder, you have told us what a number of persons think of the defendant. What does the rest of Ketchikan think about him?

A. Well, your Honor, I wouldn't know that because I haven't discussed it with them and I just don't know.

The Court: That is all.

Recross-Examination

By Mr. Baskin:

Q. Just a moment. I want to ask you a question. Are you employed at the present time?

A. No, sir. [319]

Q. What was your former employment?

A. I was assistant steward at the Veterans of Foreign Wars Club.

(Testimony of John F. Van Gilder.)

Q. You were assistant steward? Is that a bartender? Is that what you mean?

A. Part of my duties were that; yes.

Q. And at the Veterans Club? A. Yes, sir.

Mr. Baskin: No further examination.

Mr. Kay: That is all, Mr. Van Gilder.

(Witness excused.)

Mr. Kay: Defense rests.

The Court: Does the prosecution have any rebuttal?

Mr. Baskin: Well, at present, your Honor, I don't. I don't think so. I do have a motion though, however, to make in the absence of the jury.

Mr. Kay: And I also have a motion.

The Court: Did you say you don't think you have any rebuttal?

Mr. Baskin: No, I don't believe I do.

The Court: Well, the jury may be excused until tomorrow morning at ten o'clock. You may retire now. The Court will remain in session however.

(Whereupon the jury retired from the courtroom.)

Mr. Baskin: May it please the Court, at this time I [320] would like to move that the Court have stricken from the record in this case, and the jury appropriately instructed, all of the evidence relating to alleged entrapment of the defendant in this case on the grounds that their defense of entrapment was not established by the evidence.

(Whereupon argument on the motion was presented by respective counsel, and the defendant was given until 9:30 o'clock a.m., October 25, 1950, to present citations in support of his contentions.)

(Thereupon Court was adjourned until 9:30 o'clock a.m., Otcober 25, 1950, reconvening as per adjournment, with all parties present as heretofore, and in the absence of the jury; whereupon the trial proceeded as follows.)

Mr. Kay: May it please the Court, at this time in order that we can dispose of all of these motions together, I would like to move for a judgment of acquittal.

The Court: The same grounds?

Mr. Kay: The same grounds will be raised.

The Court: Well, the motion is denied. You may submit such authorities as you have (referring to the motion of the Government heretofore made).

(Whereupon further argument on the motion of the Government was presented by respective counsel, and Court then recessed for ten minutes, reconvening as per recess with all parties present as heretofore, and the jury all present in the [321] box; whereupon the Court denied the motion of the Government, and the trial proceeded as follows:)

The Court: Is there any rebuttal?

Mr. Baskin: No, we haven't any, your Honor.

The Court: Both sides rest then?

Mr. Baskin: Yes, sir.

Mr. Kay: Yes, sir.

The Court: You may proceed with the argument then.

(Whereupon, Stanley D. Baskin, Assistant United States Attorney, made the opening argument to the jury in behalf of the Government; and thereafter, Wendell Kay, of attorneys for the defendant, commenced the argument to the jury in behalf of the defendant.)

(Thereupon, the jury was duly admonished and Court recessed until 2:00 o'clock p.m., October 25, 1950, reconvening as per recess, with all parties present as heretofore, and the jury all present in the box; whereupon, Wendell Kay, of attorneys for the defendant, concluded the argument to the jury in behalf of the plaintiff; and thereafter, Ernest E. Bailey, Assistant United States Attorney, made the closing argument to the jury in behalf of the Government.)

(Whereupon, Court recessed for five minutes, reconvening as per recess, with all parties present and the jury all present in the box: and)

(Thereupon, respective counsel were furnished copies [322] of the Court's Instructions to the Jury, and the Court read his Instructions to the Jury.)

The Court: Any exceptions?

(Whereupon, respective counsel and the court reporter approached the bench, out of hearing of the jury, and the following occurred:)

Mr. Kay: I except to the failure to give the three instructions requested by the defendant; and except to Instruction 7, line 22, except to the words "encourage or cooperate with him in his commission of it"; line 29 "overcome the will power and judgment of the other"; on Page 8 except to the words "for personal gain or because Lamb was about to withdraw and make the offer to another," line 3; and line 22, "and urged him to commit them or encouraged or cooperated with him in its commission." I have no other exceptions.

Mr. Baskin: No exceptions.

(Whereupon, respective counsel and the court reporter withdrew from the bench and were again within hearing of the jury; the bailiffs were duly sworn to take charge of the jury, and the jury retired to the jury room at 3:25 o'clock p.m. in charge of the bailiffs to deliberate upon a verdict; whereupon Court adjourned until 10:00 o'clock a.m., October 26, 1950, subject to the call of the jury, and having reconvened as per adjournment, with all parties present as heretofore, and the jury all present in the jury box with the exception of William [323] T. Burns, who, having become ill, was excused by stipulation of respective counsel; whereupon the following proceedings were had):

The Court: Ladies and gentlemen of the jury, through your Foreman you have asked me the following questions: "Having been deadlocked for

eleven hours, we wish further instructions. (1) How much emphasis should we place on lines 27 and 28, page 8. (2) Some jurors feel the whole case rests on the final paragraph, page 8. Others feel the case is clear and does not hinge on that paragraph of your instructions but rather on lines 5 and 6, page 7." I instruct you further as follows:

(Whereupon, respective counsel were furnished copies of the Court's Supplemental Instructions to the Jury, and the Court read his Supplemental Instructions to the Jury.)

The Court: Any exceptions?

Mr. Kay: Yes, your Honor.

(Whereupon, respective counsel and the court reporter approached the bench, out of hearing of the jury, and the following occurred):

Mr. Kay: I again except very definitely to lines 19 and 20, "the defendant voluntarily chose to accept the proposal for personal gain." (Reference made to citations.) I also except to the entire instructions and particularly to the complete paragraph on Page 2, the last page, Page 3, on [324] the ground that entirely too much emphasis is placed on personal gain. (Reference made to citations.)

The Court: I don't see it that way.

Mr. Kay: I respectfully except to the entire instruction.

(Whereupon, respective counsel and the court reporter withdrew from the bench and were again within hearing of the jury.)

The Court: The jury may now retire for further deliberation.

(Whereupon, the jury retired to the jury room at 10:35 o'clock a.m. in charge of the bailiffs to deliberate upon a verdict; and thereafter Court reconvened at the call of the jury at 3:00 o'clock p.m., October 26, 1950, with all parties present as heretofore, and the eleven jurors all present in the jury box; whereupon the following proceedings were had):

The Court: Ladies and gentlemen of the jury, you have informed me through your foreman that you are hopelessly deadlocked. Now, I don't want to know how you stand in your balloting. It is improper for anyone to state how the balloting stands. But I do want to know whether you have made any progress or whether the balloting has been unchanged for a considerable length of time.

Foreman: Well, it has been the same since [325] ten o'clock last night, your Honor.

The Court: No change in the balloting?

Foreman: No change at all.

The Court: Well, I am going to give you another instruction on entrapment which is the only one that you need to pay attention to so far as the special instruction is concerned, and see if that might not help you.

(Whereupon, respective counsel were furnished copies of the Court's Second Supplemental Instructions to the Jury, and the Court

read his Second Supplemental Instructions to the Jury.)

The Court: In other words, so far as the law of entrapment is concerned, you need consider no other instruction except the one just given to you now. Are there any exceptions?

Mr. Kay: There certainly are, your Honor.

(Whereupon, respective counsel and the court reporter approached the bench, out of hearing of the jury, and the following occurred):

Mr. Kay: First, I wish to except because it does not call to the jury's attention properly the question of reasonable doubt as to any element of the entrapment. In other words, if there is a reasonable doubt as to the facts, they are entitled to bring in a verdict of not guilty. I except to the entire instruction. It doesn't state accurately [326] the law of entrapment; second paragraph, second page, lines 12 through 21, as being inaccurate statement of the law of entrapment, emphasis on personal gain; and in that connection I cite Morei vs. U.S., 127 F. 2d, and I do not have the page number; and I object also to the entire paragraph beginning on Page 2, line 31 through line 15, on Page 3, as being an inaccurate statement of the law of entrapment; and I object particularly to lines 4 through 14 on Page 3, stating an illustration which is not in line with the law of entrapment as set forth in the Morei case previously

cited and the other decisions of the Circuit Court in the case of Wo Wai vs. U.S., Ninth Circuit Court of Appeals.

(Whereupon, respective counsel and the court reporter withdrew from the bench and were again within hearing of the jury.)

The Court: You may retire to further deliberate.

(Whereupon, the jury retired to the jury room at 3:12 o'clock p.m., in charge of the bailiffs to deliberate upon a verdict; and thereafter Court reconvened at the call of the jury at 4:10 o'clock p.m., October 26, 1950, with all parties present as heretofore, and the eleven jurors all present in the jury box; whereupon the following proceedings were had):

The Court: Ladies and gentlemen, have you reached a verdict?

Foreman: We have, your Honor. [327]

The Court: You may hand it to the Clerk. You may read and file the verdict.

(Whereupon, the verdicts were read by the Clerk, finding defendant guilty as charged in both counts of the indictment; whereupon, the jury was excused and retired from the courtroom.)

Mr. Kay: May it please the Court, at this time I would like to move for a judgment of acquittal notwithstanding the verdict on several grounds; first, on the ground that the instructions of the

Court on the question of entrapment do not accurately state the law on that defense; and second, that the jury, having developed more or less of a deadlock since ten o'clock last night, were in fact coerced into arriving at a judgment of guilty by the second instruction of the Court on the subject of entrapment to which I have already objected.

The Court: I think you should call that the third instruction.

Mr. Kay: Third; I am sorry, and it is the second supplementary?

The Court: Yes.

Mr. Kay: That is all that I care to say on that subject.

The Court: Well, I realize the difficulty, of course, of framing any instructions on entrapment to meet the peculiar facts in this case, and the reason for the difficulty is that I think we are all on the wrong theory. I don't think that [328] the defense of entrapment applies to the acts, to the criminal act, or a corrupt public officer. I don't think the United States is chargeable and, if you didn't rely solely on entrapment as a defense, I never would have submitted it to the jury in the first place.

Mr. Kay: May I further request, your Honor, that a stay of execution be granted for a period of five days in which the defendant can have an opportunity to arrange his affairs, and bond be continued in the same amount?

Mr. Baskin: Your Honor, we have two motions before you pass on that. One is that the Court set

next Monday, October 30th, as time for sentence, and at this time I also move that the defendant be remanded to the custody of the Marshal.

(Whereupon, argument on the matter of bond was presented by respective counsel.)

The Court: Well, I am inclined to allow the defendant to go at the present bail, at least until after sentence. Then after sentence, why if you feel that the security is insufficient to assure his attendance, you might bring it to the attention of the Court again. But at the present time I think, unless you have some reason you haven't disclosed, it would seem to me to be sufficient.

Mr. Baskin: We will abide by the judgment of the Court, your Honor, but you haven't fixed the time for sentence. [329]

The Court: I was just going to remark that fixing of time for sentence would, of course, not have any effect on your motion for stay of execution, so time will be fixed for ten o'clock Monday morning.

(Thereafter, on the 30th day of October, 1950, at 10:00 o'clock a.m., with all parties present as heretofore, with the exception of Wendell Kay, the Court denied the motions made heretofore by counsel for defendant upon the filing of the verdicts; whereupon, sentence was imposed on the defendant, and upon motion by counsel for the defendant that the defendant be admitted to bail pending appeal, the Court admitted the defendant to bail in the amount of $7,500.00 and committed him to the

custody of the Marshal until such time as he would furnish bail.

(Thereafter, on the 3rd day of November, 1950, at 10:00 o'clock a.m., defendant's motion for a new trial being called up for hearing, the Court ordered that the supplemental motion and supporting affidavits be stricken from the files; whereupon, argument was presented by Robert H. Ziegler in behalf of the motion, and the Court denied the motion).

(End of Record.) [330]

United States of America,
Territory of Alaska—ss.

I, Mildred K. Maynard, Official Court Reporter for the hereinabove-entitled Court, do hereby certify:

That as such Official Court Reporter I reported the above-entitled cause, viz., United States of America vs. Joseph C. Patterson, No. 1549-KB of the files of said court;

That I reported said cause in shorthand and myself transcribed said shorthand notes and reduced the same to typewriting;

That the foregoing pages numbered 1 to 330, both inclusive, contain a full, true and correct transcript of all the testimony and proceedings at the trial of the above-entitled cause, to the best of my ability.

Witness, my signature this 13th day of January, 1951.

/s/ MILDRED K. MAYNARD,
Official Court Reporter.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, J. W. Leivers, Clerk of the District Court for the Territory of Alaska, First Division thereof, do hereby certify that the foregoing and hereto attached 54 pages of typewritten matter, numbered from 1 to 54, both inclusive, constitute a full, true and complete copy, and the whole thereof, of the record prepared in accordance with the praecipe and supplemental praecipe of the Appellant on file herein and made a part hereof, in Cause No. 1549-KB, wherein Joseph C. Patterson is Defendant-Appellant and the United States of America is Plaintiff-Appellee, as the same appears of record and on file in my office; that said record is by virtue of a Notice of Appeal in this cause and the return thereof in accordance therewith.

And I further certify that this transcript was prepared by me in my office and that the cost of preparation, examination and certification amounting to $26.60 has been paid to me by counsel for Appellant.

In Witness Whereof, I have hereunto set my hand and the seal of the above-entitled court this 17th day of January, 1951.

[Seal] J. W. LEIVERS,
Clerk of the District Court.

By /s/ A. V. SIMONSEN,
Deputy.

[Endorsed]: No. 12812. United States Court of Appeals for the Ninth Circuit. Joseph C. Patterson, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Division No. One.

Filed January 19, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 12,812

IN THE

United States Court of Appeals

For the Ninth Circuit

JOSEPH C. PATTERSON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court for the Territory of Alaska, First Division.

BRIEF FOR APPELLANT.

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ROBERT H. ZIEGLER, SR.,
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No. 12,812

IN THE

United States Court of Appeals

For the Ninth Circuit

JOSEPH C. PATTERSON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court for the Territory of Alaska, First Division.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

On September 29, 1950, the Grand Jury filed in the District Court for the Territory of Alaska, Third Judicial Division, an indictment charging Joseph C. Patterson with violations of the law against bribery (Section 201, Title 18, U.S.C.) as follows:

> "That on or about the 19th day of August, 1950, in Division Number One, Territory of Alaska, Joseph C. Patterson did knowingly, wilfully, unlawfully and feloniously offer and give John Roger Lamb the sum of One Hundred Eighty Dollars ($180.00) in lawful money of the United States, said John Roger Lamb being a person acting for and on behalf of the United States

in an official function, under and by authority of the Fish and Wildlife Service, United States Department of the Interior, whose duties were to observe the area of Mink Arm, Boca de Quadra, Alaska, then and there closed to commercial fishing for salmon, to report and disclose of officials of said Fish and Wildlife Service and other law enforcement officials and to arrest and cause the arrest and prosecution of, all persons fishing illegally for salmon in said closed area; knowing said John Roger Lamb was a person acting for and on behalf of the United States in an official function with duties as aforesaid, and with the intention on the part of said Joseph C. Patterson to influence and induce John Roger Lamb to do an act of violation of his lawful duties; that is to say, to unlawfully refrain from and omit to report and disclose to officials of the Fish and Wildlife Service and other law enforcement officials, that said Joseph C. Patterson did fish illegally in said area closed to commercial fishing for salmon, and to refrain from arresting or causing the arrest and prosecution of said Joseph C. Patterson for illegally fishing in said area."

The indictment contained a second count, charging a second bribe in the amount of $100.00 on August 21, 1950, given to the same official of the Fish and Wildlife Service, in substantially identical language. (R 3-5.)

The District Court had jurisdiction of the indictment and of the trial by virtue of the provisions of Sections 53-1-1, 53-2-1 and 66-3-1 of the Alaska Compiled Laws Annotated, 1949.

The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal by virtue of the provisions of Sections 1291 and 1294, Chapter 83, New Title 28, U.S.C.

STATEMENT OF THE CASE.

Joseph C. Patterson, appellant, is a resident of Ketchikan, Alaska, where he was engaged in operating a restaurant known as the 400 Club. (R 207.) In September of 1949, appellant acquired a one-half interest in a commercial fishing boat called the Rolling Wave, the other half being purchased at the same time by a friend, William N. Tatsuda. (R 263.) Neither appellant nor Tatsuda used the boat in commercial fishing during the 1949 season; in fact, appellant had never engaged in commercial fishing prior to the 1950 season. (R 240.)

John Roger Lamb was an employe of the Fish and Wildlife Service, a branch of the United States Department of the Interior, during the summer of 1950. (R 59.) Lamb was employed as a Deputy Enforcement Agent on June 7, 1950, and was continuously so employed until August 22, 1950. He had worked in a similar capacity during the two previous fishing seasons, those of 1948 and 1949, and as such, was an official, or employe of the United States Government serving in an official function. (R 60.)

In the late Fall of 1949, Lamb approached Tatsuda and intimated to Tatsuda that he had been "selling

fish" out of the area in which he was employed as a stream watchman during the summer of 1949; or, more explicitly, that he had been taking bribes to permit illegal fishing. Lamb went on to state that he was going to "work it differently next season if he got the same job back". (R 262.) He indicated that he planned to work with just one or two boats instead of letting everybody come in. (R 262.) Early in June, 1950, Lamb again approached Tatsuda and urged Tatsuda to send the Rolling Wave down to the area where Lamb was employed as stream watchman "to get in on an early run of Sockeyes." (R 263.) Lamb told Tatsuda that, "if he had a boat down there last year he would have made a young fortune; I believe that is what he said, a young fortune; and that this year he was trying to get a boat lined up to go down and fish the stream during that time before the regular season opened up". (R 264.) Tatsuda made no deal with Lamb.

When employed for the 1950 season, Lamb was assigned as stream watchman in Mink Arm of the Boca de Quadra area, his primary duties being to prevent illegal commercial fishing within closed waters. (R 60-61.) He left Ketchikan to go to his work in the Boca de Quadra on June 8, 1950. (R 105.) About a month later, Lamb returned to Ketchikan to purchase groceries and pick up other supplies. (R 65, R 103.) On that occasion, Lamb went to the grocery store being operated by Tatsuda and there engaged in a conversation with Tatsuda and appellant concerning illegal fishing in the Boca de Quadra.

(R 229.) Lamb informed appellant that he was now the stream watchman in the Boca de Quadra, and solicited appellant to bring the Rolling Wave out to that area and there engage in illegal fishing. In the course of conversation, Lamb said: "there is a lot of money to be made out there this year"; "I made a lot of money out there last year"; "I am only going to work with one or two boats this year instead of letting everyone in like I did last year"; "why don't you fellows bring the Rolling Wave down there and fish the stream, and we will all make some money"; "you don't have to worry any about getting caught. It will be fixed". (R 229-230.) Tatsuda and Patterson did not make any "deal" with Lamb. (R 230.)

In August, Patterson completed equipping the Rolling Wave for commercial fishing and engaged a crew. (R 231.) The Rolling Wave left Ketchikan at about noon on August 14, the day prior to the opening of the season, and proceeded to a point near Cygnet Island in the Boca de Quadra area. (R 232.) As the Rolling Wave approached Cygnet Island, Lamb came out to the boat in a skiff equipped with an outboard motor, and proceeded to board the Rolling Wave. On this occasion, Lamb again urged appellant to engage in illegal fishing in the closed area of the Boca de Quadra. (R 234.) Appellant again refused: "John Lamb said there was quite a few fish up in the creek, a lot of money to be made, and he had everything fixed if we did come up and catch them, so he repeated this with other suggestions dur-

ing this about a mile or a mile and one-half run, and we tied up, and all of the crew, we talked about it to them, and I didn't want to do it. The crew didn't want to do it. So we told him no; that was about all of it". (R 234.)

Lamb left the Rolling Wave, but returned to it again on the same evening. (R 235.) Again he renewed his solicitation of Patterson, while appellant was washing dishes in the fo'c'sle. Lamb assured Patterson that there was a great deal of money to be made. He stated that he had made enough money "last year selling fish out of the creek to pay all his bills, buy a troller and seven-thousand-dollar home in Washington". (R 236.) He assured Patterson that he had other agents in the area "fixed". (R 236.)

On August 15, the Rolling Wave left the Boca de Quadra, and fished in the vicinity of Lucky Cove or Point Alva. (R 237.) On either the 15th or 16th of August, Lamb came alongside the Rolling Wave in a Fish and Wildlife Service boat referred to as the "Chris-Craft" and tied up for a few minutes. Lamb was accompanied by Richard Warner, another Fish and Wildlife agent, and introduced him to Patterson. Lamb then said in Warner's presence, "I just wanted to prove to you that everything is fixed", and "There are a lot of fish up there tonight. If you guys want to go up there and fish, there is nothing to worry about. We have the light signal all figured out." (R 238.) This was affirmed by Warner, indicating acquiescence in the "fix". (R 238, 136-137.)

During the evening of August 16, Lamb boarded the Rolling Wave for the fourth time and again urged his scheme for illegal fishing upon Patterson. Upon this occasion, finally, Patterson agreed to go along with the proposition, and the amount of the bribe to be paid Lamb and the other agents was, at Lamb's suggestion, set at $100.00 per thousand fish illegally taken by the Rolling Wave. (R 239.)

Appellant then proceeded to fish in the closed areas on two or three occasions, and paid Lamb according to their understanding. (R 239-240, 242-244.)

Lamb had no intention of arresting appellant, or causing his arrest; he intended to go through with the deal and make as much money as possible. (R 118.) Early in August, however, and before any deal had been made or any bribes given, Lamb's superiors in the Fish and Wildlife Service learned of his activities. (R 134-135, 147-149.)

Warner claimed to have heard of some kind of deal between Lamb and appellant before leaving Ketchikan to go to the Boca de Quadra. (R 134-135.) He made a report to his superior officer in the Fish and Wildlife Service, John D. Wendler, on August 9 (R 198-199), and the information was immediately passed on to the United States Attorney and the Federal Bureau of Investigation. (R 149.) Wendler instructed Warner, and his companion agent on the Chris-Craft, Eugene Cottrill, to "go ahead and see what happened". (R 156.) Wendler also made preparations to apprehend the Rolling Wave by sending

agents Robert Halstead and Charles Graham to the area to observe any illegal fishing which might occur. (R 195.) Warner and Cottrill ostensibly entered into the deal with Lamb, and led Lamb and appellant to believe that they would like to be "cut in" and would accept a "split" of the bribe. (R 137, 142, 153-154.) This understanding with Lamb was reached on the evening of August 13.

Appellant had never fished commercially prior to the season of 1950; before Lamb approached him he had never had any intention of fishing illegally or of bribing a stream watchman. (R 240.) Although appellant had been convicted of such misdemeanors as gambling and selling liquor without a license in September, 1948 (R 250-251), and had been convicted of other misdemeanors (soliciting gambling and disorderly conduct) in San Diego in 1937 and 1943 (R 254), there was no evidence that he had ever engaged in any previous acts of bribery or illegal fishing, or formed any intent to do so. John F. Van Gilder, a resident of Ketchikan for twenty years, testified that the general reputation of appellant in the community for honesty and integrity was "the very finest". (R 322-323.) This testimony was not contradicted nor shaken. (R 323-335.)

At the conclusion of the Government's evidence, appellant moved the Court for a judgment of acquittal, and argument was presented that entrapment had been established by the testimony of the Government witnesses. The motion was denied (R 205), and was renewed and denied at the conclusion of all the evi-

dence. (R 337.) Thereafter, the defendant presented three proposed instructions, which were refused. (R 6-8.) The jury was instructed, and exceptions were taken to the instructions, specifically pointing out the errors in the instructions on entrapment. (R 339, 8-24.)

The jury retired to consider the case at 3:25 o'clock on the afternoon of October 25, 1950. (R 339.) After deliberating all night, at 10 o'clock the following morning the jury reported that they were dead-locked and requested further instructions on entrapment, whereupon the Court gave "Supplemental Instructions to The Jury" on entrapment, and exceptions, both specific and general were taken. (R 340, 24-26.) At 3 o'clock that afternoon, the jury, having reported that they were hopelessly dead-locked, the Court gave its Second Supplemental Instructions to The Jury, and instructed the jury that they need consider no other instructions on the subject of entrapment. (R 341-342, 27-30.) Exceptions were taken to this instruction. (R 342-343.) At 4:10 in the afternoon on October 26, 1950, the jury returned their verdicts, finding defendant guilty as charged in both counts of the indictment. (R 343.) The defendant moved for a judgment of acquittal notwithstanding the verdict, on the grounds that the Court had erred in its instructions on entrapment, and that the jury had been coerced into a verdict by the repeated prejudicial instructions of the Court. (R 344.) The defendant moved for a new trial which was denied (R 346), and on October 30, 1950, the Court rendered its judgment

and commitment that appellant be imprisoned in the Federal Penitentiary at McNeil Island, Washington, for a period of two years on each count, the sentences to run concurrently, and to pay a fine of $300.00 on each count. (R 31-32.) This appeal followed.

STATEMENT OF POINTS RELIED UPON.

1. That the Court erred in denying defendant's motion for a judgment of acquittal, made at the conclusion of the evidence offered by the Government.

2. That the Court erred in denying defendant's motion for judgment of acquittal, made at the close of all the evidence.

3. The following portion of Instruction No. 1 of the Court's Second Supplemental Instruction was prejudicial and erroneous in that it holds in effect that if the defendant were motivated by a desire for personal gain, such motivation constituted insufficiency of inducement, so as to make unavailable to the defendant the defense of entrapment:

> "* * * The proposal must have been accompanied by importunities, pleas or persuasion sufficient to overcome the will power and judgment of the other and induce, lure or entice him to commit a crime which he otherwise would not have committed. Whether in this case any such inducement, lure or enticement was made, given or held out by Lamb to the defendant is for you to say.
>
> "The defendant testified that he paid one bribe on August 17, another on the 18th and the third

on the 21st. *If you find that the defendant was induced to bribe, not for personal gain, but because his will power and judgment had been overcome by the inducement offered and that after he had given the first bribe he subsequently gave two more, the defense of entrapment would not be available to him as to the second and third bribes unless you further find that he was still acting under the influence of the inducement, enticement and lure to commit the first bribery.*

"If you find from the evidence that the defendant offered a bribe to Lamb or had the intent to commit the crimes charged or either of them, or accepted Lamb's proposal, not because he was induced to accept it but from a desire for personal gain or from the fear of losing an opportunity for profit, then the defense of entrapment would not be available and you should find the defendant guilty regardless of whether Lamb urged, encouraged or cooperated with him in the commission of the crimes involved.

"The test is whether the defendant acted voluntarily and chose to commit the crimes charged, or either of them, from a desire for personal gain or from the fear of losing an opportunity to profit or whether his will power and better judgment were so overcome by Lamb that he was induced to commit the crimes charged without having had any previous intention to do so. To illustrate, if 'A', a custodian of government property tell 'B' that he will allow him to steal for a percentage of the profits from the sale thereof, then there would be no entrapment even though 'A' told 'B' that it was an excellent opportunity for making a lot of money. On the other hand, if 'A'

told 'B' that he was in dire financial straits, that his family was on the verge of starvation and he was greatly in debt and begged him to steal goods from his custody and by such means induced 'B' to steal for the accommodation of 'A', which otherwise 'B' would not even have contemplated, it would be entrapment."

4. That the Court erred in refusing to give the following proposed instructions on behalf of the defendant:

DEFENDANT'S PROPOSED INSTRUCTION NO. 1.

"It is well settled that decoys may be used to entrap criminals, and to present opportunity to one intending or willing to commit crime. But decoys are not permissible to ensnare the innocent and law-abiding into the commission of crime. When the criminal design originates, not with the accused, but is conceived in the mind of government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefor.

"If the jury are satisfied that prior to the commission of the acts alleged that the defendant never conceived any intention of committing these offenses or any similar offenses, but that the officers of the government incited and by suasion and representations lured him to commit the offenses alleged in order to entrap, arrest, and prosecute the defendant therefor, then these facts are fatal to the prosecution of these offenses, and the defendant is entitled to a verdict of not guilty."

DEFENDANT'S PROPOSED INSTRUCTION NO. 2.

"As the Government has the burden of proof throughout this trial, if you have any reasonable doubt of the defendant's having been lured by entrapment, as I have heretofore defined that term, into the commission of the offenses charged, when theretofore he had no such intention, he is not guilty of any offense and should be acquitted."

5. That the verdict is contradictory to the weight of the evidence.

6. That the verdict is not supported by substantial evidence.

7. That the Court erred in denying the defendant's motion for a new trial.

8. Other manifest errors appearing of record, to which objection was taken, particularly the action of the Court in restricting testimony as to the previous record of the defendant, and the activities of the Government agents.

ARGUMENT.

The first three points raised, and points five, six and seven, will be discussed together, since they relate to the defense of entrapment and to the evidence justifying an acquittal.

The essential principles of the law of entrapment have been enunciated and reviewed by this Court and other Courts of the United States on numerous oc-

casions. See *O'Brien v. United States* (CCA 7th, 1931) 51 F.(2d) 674, and extensive collection of authorities at page 678. This Court has examined the defense on at least eight occasions since its decision in *Woo Wai v. United States* (CCA 9th, 1915) 223 Fed. 412. See, *Peterson v. United States* (CCA 9th, 1919) 255 Fed. 433; *Sam Yick v. United States* (CCA 9th, 1917) 240 Fed. 60; *Orsatti v. United States* (CCA 9th, 1925) 3 F.(2d) 778, cert. den., 268 U.S. 694; *Meyers v. United States* (CCA 9th, 1933) 67 F.(2d) 223; *Ratigan v. United States* (CCA 9th, 1937) 88 F.(2d) 919, cert. den. 57 S. Ct. 938; *Louie Hung v. United States* (CCA 9th, 1940) 111 F.(2d) 325; *Farber v. United States* (CCA 9th, 1940) 114 F.(2d) 5, cert. den. 61 S. Ct. 173; *Stein v. United States* (CCA 9th, 1948) 166 F.(2d) 851.

The elements of the defense of entrapment, as found in these cases and the many others on the subject, may be briefly stated as follows: No conviction can be had where it appears that: (1) The criminal design originated with an official or agent of the Government and (2) was by such agent implanted in the mind of an hitherto innocent person, who was then (3) persuaded, lured, or enticed into the commission of the crime (4) in order that the Government might then proceed to arrest, prosecute and convict for the crime committed. The defense is based squarely on the ground that it is "contrary to public policy" and "shocking to the sense of justice" to enforce a criminal statute under such circumstances. *Sorrells v. United States* (1932) 287 U.S. 435, 53 S. Ct. 210, 77

L. Ed. 413, 86 ALR 249. As Judge Sanborn, speaking for the Court of Appeals for the Eighth Circuit, said in *Butts v. United States,* 273 Fed. 35, 38:

> "When the accused has never committed such an offense as that charged against him prior to the time when he is charged with the offense prosecuted, and never formed any intention of committing the offense prosecuted or any such offense, and had not the means to do so, the fact that the officers of the government incited and by persuasion and representation lured him to commit the offense charged, in order to entrap, arrest, and prosecute him therefore is and and ought to be fatal to the prosecution, and to entitle the accused to a verdict of not guilty (citing cases) * * * The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it. Here the evidence strongly tends to prove, if it does not do so, that their first and chief endeavor was to cause, to create, crime in order to punish it, and it is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the likes of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it."

The defense has been raised in a variety of situations out of which some refinements have grown. Thus, the defense is not available where the Government agents do not instigate but merely "provide an oppor-

tunity" for a crime to be committed. *Farber v. United States,* supra; *Louie Hung v. United States,* supra; *United States v. Spadafora* (CCA 7th, 1950) 181 F. (2d) 957; *Stein v. United States,* supra; *Browne v. United States* (CCA 6th, 1923) 290 Fed. 870; *Scriber v. United States* (CCA 6th, 1925) 4 F.(2d) 97; *Ratigan v. United States,* supra.

At least in some types of cases, the Government agent may "make the first move" toward the commission of the crime without providing a defense of entrapment. This is generally true where the agent has reasonable grounds to believe that the suspect is (1) already engaged in an existing course of similar criminal conduct, or (2) has already formed a design to commit the particular crime or similar crimes, or (3) is ready and willing to commit the particular crime "as evinced by ready complaisance" in the criminal plan. *United States v. Becker* (CCA 2d, 1933) 62 F.(2d) 1007, 1008. Certainly, where the accused is regularly engaged in the line of criminal conduct, it is permissible to provoke him into a particular act which is only one of a uniform series. *United States v. Becker,* supra; *United States v. Chiarella* (CCA 2d, 1950) 184 F.(2d) 903. Examples of this nature frequently arise in connection with the illicit sales of narcotics or liquor.

POINT I.

THE APPELLANT WAS ENTRAPPED AND WAS ENTITLED TO A JUDGMENT OF ACQUTTAL.

On the evidence, measured by these principles, the Court erred in refusing to grant appellant's motion for a Judgment of Acquittal, made at the close of the government's evidence and renewed at the close of all the evidence.

When the defense of entrapment is advanced, it becomes incumbent upon the prosecution to prove beyond a reasonable doubt that no entrapment has in fact taken place. *Ryles v. United States* (CCA 10th, 1950) 183 F.(2d) 944 (instruction approved "* * * the burden is upon the government to prove by competent evidence to the satisfaction of the jury beyond a reasonable doubt that it was not entrapment." 945); *Heath v. United States* (CCA 10th, 1948) 169 F.(2d) 1007, 1010; *Gargano v. United States* (CCA 5th, 1928) 24 F.(2d) 625, 626.

There is a question for the jury only where there is a substantial controverted issue of fact with regard to the existence of one or more of the essential elements of entrapment. If the evidence conclusively shows entrapment, or is uncontroverted, the defendant is entitled to a directed verdict or judgment of acquittal. *O'Brien v. United States,* supra; *Morei v. United States* (CCA 6th, 1942) 127 F.(2d) 827; *United States ex rel. Hassel v. Mathues* (D.C. Pa., 1927) 22 F.(2d) 979 (defendant will be released on habeas corpus where entrapment is established); *United States v. Lynch* (D.C. N.Y., 1918) 26 Fed. 983; com-

pare, *Louie Hung v. United States,* supra ("It is enough to say that the showing of entrapment was not so clear as to entitle appellant to an acquittal as a matter of law." 111 F.(2d) at page 325); and Roberts, J., concurring in *Sorrells v. United States,* supra ("Proof of entrapment, at any stage of the case, requires the Court to stop the prosecution, direct that the indictment be quashed, and the defendant set at liberty." 287 U.S. 435, at 457).

So, in the present case, the following facts were conclusively established: (1) the whole idea of illegal fishing and bribery to permit it originated with Lamb, the government agent. He approached not only Paterson and Tatsuda, but also Klingbeil and Lindsey with the same idea. Appellant (R 227-230), Tatsuda (R 260-263, 265-266), Klingbeil (R 279-282), Lindsey (R 289-292), Maltsberger (R 310-314), and Russell (R 302-303) all testified that Lamb took the initiative and was the originator of the criminal scheme. *This testimony was not denied.* When questioned about these vital conversations, Lamb took refuge consistently behind the stock answers, "I don't recall that" or "I don't believe I did," or "I don't remember as I did." (R 96, 97, 98, 101, 103, 105, 106, 107, 112, 113, 118, 119, 121, 219, 226.)

(2) Lamb, an official of the United States, implanted the corrupt scheme in the mind of appellant, who was then entirely innocent of any intent to fish illegally or engage in bribery to do so, who had never engaged in any such course of criminal conduct, and who evinced no "ready complaisance". The prose-

cution made not the slightest attempt to prove that appellant had ever engaged in any previous bribery schemes, or ever intended to do so until approached by Lamb.

(3) Lamb persuaded and enticed appellant to fish illegally and pay a bribe for the privilege. The evidence shows that Lamb solicited appellant on five or six separate and distinct occasions; repeatedly he urged upon him the large amounts of money to be made by proceeding with the scheme. Repeatedly appellant rejected Lamb's importunities; on the final occasion he yielded. Compare, *Peterson v. United States,* supra (repeated solicitations to sell beer).

(4) The intention of the government officials was to arrest and prosecute appellant for bribing Lamb. Warner was instructed to "go along" with Lamb; he acquiesced in the scheme in appellant's presence. (R 136-137.) Wendler knew the situation on August 9, and laid the plans for arrest. (R 195, 198-199, 201-202.) The United States Attorney and the Federal Bureau of Investigation had been alerted. (R 149.) The witnesses were placed in position, door ajar, to "await the downfall and ignominy of the victim". *O'Brien v. United States,* 51 F.(2d) 674 at 680. Having placed and kept Lamb in a position to lure appellant, and having knowingly and willingly permitted and encouraged the scheme to continue to the completion of the crime, the government must also accept the responsibility for Lamb's success in creating the criminal intent. *Cermak v. United States* (CCA 6th, 1925) 4 F.(2d) 99.

POINT II.

THE INSTRUCTIONS OF THE COURT ON THE SUBJECT OF ENTRAPMENT WERE ERRONEOUS AND MISLED THE JURY.

The Court gave three separate instructions to the jury on the defense of entrapment. We will argue only the errors committed in the third instruction, "Second Supplemental Instructions To The Jury" (our Point 3 above), since this instruction compounded the errors previously committed, and the Court admonished the jury that, "so far as the law of entrapment is concerned, you need consider no other instruction". (R 342, 27-30.) The effectiveness of this admonishment may be gauged by the fact that the jury, having been deadlocked with no change in balloting for nearly twenty-four hours, proceeded to return verdicts of guilty in less than an hour. (R 341, 343.)

We submit that the "Second Supplemental Instructions To The Jury" was an erroneous and inaccurate statement of the law and contained a number of prejudicial errors:

(A) In the second paragraph of the instruction the Court said, "The prosecution contends that the defendant was merely afforded an opportunity to commit the crimes charged and that he had the intent or the willingness to commit them." (R 27.) We submit that there was no evidence, nor even any contention advanced by the prosecution, upon which to base such an instruction. The uncontradicted evidence was that Lamb was the instigator of the scheme throughout, and that appellant "didn't even know what illegal

fishing was'' until approached by Lamb, the government agent. (R 240.) The facts bear no resemblance to those cases in which the government merely ''affords an opportunity'' to a criminal, or one intent on crime. Compare, *Louie Hung v. United States,* supra; *United States v. Spadafora,* supra. Appellant certainly evinced no ''ready complaisance''. Compare *United States v. Chiarella,* supra.

This vice was reiterated in the third paragraph of the instruction, where the Court said, ''But while officers of the law may not thus entrap an innocent person into the commission of a crime they may, *if they are informed or suspect that a person has the intent or disposition to commit a crime,* not only afford him an opportunity to commit it but also may lay a trap for him by using a decoy or an artifice, stratagem or other means *and may actually solicit, encourage or cooperate with him in his commission of it''.* (R 27.) (Emphasis supplied.) While such language might be proper in some cases, the facts here provided no such occasion. There was no evidence whatever that Lamb, or any other government agent, had any suspicion of appellant, or reason to suspect him, prior to the time when Lamb approached him and commenced his series of persuasions. (R 109-111.) Lamb admitted he had never had any conversations with appellant about fishing prior to July, 1950, and didn't know whether he had ever fished before 1950 or not. (R 109.) This is a far cry from such cases as *Cratty v. United States* (C.A.D.C. 1947) 163 F.(2d) 844, or *Kott v. United States* (C.A. 5th, 1947) 163 F.(2d) 984, where there

was reason to believe the defendant was already engaged in the illicit business, and such an instruction might have been proper.

(B) Continuing, the Court injected a new refinement into the law of entrapment by instructing the jury that even if the government agent originated the criminal scheme and accompanied it by "importunities, pleas or persuasion", it must further appear that such persuasion was "sufficient to overcome the will power and judgment" of the appellant before he could avail himself of the defense. (R 28, 29.) We have, after a careful search, been unable to find any authority for the addition of this purely subjective test to the defense of entrapment. Rather, the Courts appear to have left only objective fact questions to juries in these cases, i.e., whether the government agent was the originator of the scheme, or, whether the government agent did in fact persuade the defendant to commit the crime. We submit that the addition of this requirement by the Court placed a further burden on the defendant in making his defense; a burden which neither authority nor reason require him to bear.

(C) The Court, in effect, charged the jury that "a desire for personal gain" or "the fear of losing an opportunity for profit" would not be a sufficient inducement to give rise to the defense of entrapment. (R 28, 29.) Ignoring the fact that the government agent was the instigator of the crime, and disregarding the evidence of that agent's repeated solicitation, the Court said:

> "The test is whether the defendant acted voluntarily and chose to commit the crimes charged, or either of them, *from a desire for personal gain or from the fear of losing an opportunity to profit* or whether his will power and better judgment were so overcome by Lamb, that he was induced to commit the crimes charged without having had any previous intention to do so." (R 29.)

The Court then stated an illustrative example to the jury, which was left with them as the definitive word on the subject:

> "To illustrate, if 'A', a custodian of government property, tells 'B' that he will allow him to steal for a percentage of the profits thereof, then there would be no entrapment even though 'A' told 'B' that it was an excellent opportunity for making a lot of money. On the other hand, if 'A' told 'B' that he was in dire financial straits, that his family was on the verge of starvation and he was greatly in debt and begged him to steal goods from his custody and by such means induced 'B' to steal for the accommodation of 'A' which otherwise 'B' would not have even contemplated, it would be entrapment."

We submit that the "desire for personal gain" and the "opportunity to profit" is one of the strongest "persuaders" or "lures" which a government agent could possibly use to incite an innocent, but ductile, person to undertake such a crime. "For the love of money is the root of all evil:" I Timothy 6:10. Such would seem to be the consistent view taken by the courts of the United States. In *Morie v. United States,*

supra, the government agent induced the defendant to sell heroin with which to dope horses in "fixed" races by painting a pretty picture of the "big money" to be made. The Court held that a motion to direct a verdict of acquittal should have been granted and reversed the conviction. See also, *Capuano v. United States* (CCA 1st, 1925) 9 F.(2d) 41 (lure was fear of losing alcohol permit, and fear of physical violence); *United States ex rel. Hassel v. Mathues,* supra (lure was hope of profits on illegal shipments of beer); *United States v. Intoxicating Liquors* (D.C. N.H. 1923) 290 Fed. 824 (lure was the opportunity for a "large sale"); *United States v. Polakoff* (CCA 2nd, 1941) 121 F.(2d) 333 (cash lure of $500.00; sufficient to go to the jury); *Weathers v. United States* (CCA 5th, 1942) 126 F.(2d) 118 (lure of "some money" to be paid for abortion; properly submitted to jury); *Meyer v. United States,* supra (no lure except profit on liquor sale; properly submitted to jury); *Woo Wai v. United States,* supra (lure was "scheme by which they could make some money"; must be properly submitted to jury).

As to the illustrative examples featuring "A" and "B", given by the Court, we submit that they were grossly inadequate to advise the jury properly and did not portray accurately the elements of entrapment which it was the duty of the jury to consider. We respectfully submit that the first example concerning "A" and "B" (R 29) *would* be entrapment even on the bare facts stated by the Court; *at the very least it would raise an issue of fact for a jury. Browne v.*

United States, supra; *Ybor v. United States* (CCA 5th, 1929) 31 F.(2d) 42. If we add other essential facts to the facts stated in the example, that "B" was an innocent person having no intention to steal government property, and that "A" urged the illegal scheme upon him "assiduously and persistently", then the illustration would certainly be a classic example of entrapment. Compare, *Woo Wai v. United States,* supra.

Concededly, the second illustration employed in the instruction is an example of entrapment, albeit an unusual one. The "lure" employed to entice an innocent person into crime may just as well be an appeal to sympathy as to cupidity. *Sorrels v. United States* (1932), supra (lure was an appeal to sentiment as a "war buddy"); *Butts v. United States,* supra, (lure was sympathy for the need of a fellow addict for dope); *United States v. Cerone* (CCA 7th, 1945) 150 F.(2d) 382 (lure was desire to escape military service); *Peterson v. United States,* supra (lure was sympathy). But this example bore no faint resemblance to the facts of the case before the jury, and it was clearly erroneous to convey the impression to the jury (as this instruction clearly did) that entrapment would exist *only* in circumstances similar to those stated in the example. In our opinion, the employment of these two examples in this instruction was equivalent to instructing the jury to bring in verdicts of guilty. The jury promptly did just that.

POINT III.

PROPOSED INSTRUCTIONS 1 AND 2 SUBMITTED BY THE DEFENDANT FAIRLY AND ACCURATELY STATED THE LAW OF ENTRAPMENT; IT WAS PREJUDICIAL ERROR TO REFUSE THESE INSTRUCTIONS.

The first proposed instruction requested by the defendant was a simple, concise and accurate statement of the law of entrapment. It was taken almost verbatim from the cases cited in support of it. (R 6-7.) In fact, the second paragraph of this instruction is an exact quotation of an instruction requested and refused by the trial Court in *Capuano v. United States,* 9 F.(2d) 41, at 42. Because of the failure to give this instruction that conviction was reversed and remanded. Ibid. Here the instruction was "refused because covered". In the light of our argument on the errors contained in the Second Supplemental Instructions, stated above, we cannot agree.

Because of the nature of the defense of entrapment, the defendant is entitled to have the jury instructed that it is incumbent upon the government to disprove the defense beyond a reasonable doubt. This was the effect of the defendant's second proposed instruction. It was refused "because there is no evidence that defendant was 'lured' ". (R 7.) We submit that there was ample evidence that defendant was "lured" and that the instruction requested was not adequately covered. It should have been given. *Ryles v. United States,* supra, (following instruction given, "the burden is upon the government to prove by competent evidence to the satisfaction of the jury

beyond a reasonable doubt that it was not entrapment".); *Patton v. United States* (CCA 8th, 1930) 42 F.(2d) 68; compare *Heath v. United States,* supra; *Gargano v. United States,* supra.

OTHER ERROR APPEARING OF RECORD.

THE COURT ERRED IN UNDULY RESTRICTING TESTIMONY AS TO THE BACKGROUND OF THE DEFENDANT AND THE ACTIVITIES OF THE GOVERNMENT AGENTS.

(a) Upon cross-examination of the appellant the United States Attorney was given considerable leeway in examining appellant as to his business activities and misdemeanors. (R 253, 255, 256.) Upon redirect examination by defense counsel the following colloquy occurred:

Q. Between that time and the time you came to Ketchikan, Alaska, where were you, Joe?

Mr. Baskin: Your Honor, I object to that. That is immaterial and irrelevant to the issues in this case.

Mr. Kay: I believe the occupation and the background of the defendant is something——

Mr. Baskin: It is not. I was impeaching the witness and——

Mr. Kay: Impeaching? By that kind of evidence? That certainly is incompetent. If that was the purpose of your examination. I object to it and ask that it be stricken.

The Court: Well, of course, that is not the purpose. It is merely to show the defendant's background so that the jury may appraise his testimony.

Mr. Kay: Yes, Sir; precisely.

Q. Well, where were you?

Mr. Baskin: Your Honor, I am objecting to that. It is immaterial and irrelevant as to where he was.

The Court: I think the question is too indefinite and that the objection should be sustained.

Q. Where did you go between your last conviction in 1943 and the——

Mr. Baskin: Your Honor, I object to that.

Q. And the time you arrived in Ketchikan, Alaska?

The Court: Objection sustained.

Q. Isn't it a fact that you served in the——

Mr. Baskin: Your Honor, I object to that.

Mr. Kay: Well, what in the world—I haven't asked the question.

Mr. Baskin: We know what you are going to ask.

A. Army.

The Court: Well, I assume you are asking him about military service which is improper. Objection sustained. (R 256-257.)

In the preliminary questions asked of appellant on direct examination the Court went so far as to *sustain objection to a question as to whether or not appellant was married.* (R 206-207.) Only the "wrong" side of appellant was permitted to be shown to the jury.

In an ordinary defense these matters might be considered collateral or immaterial; not so in a case

of entrapment. As the Supreme Court pointed out in the *Sorrells* case, supra, when a defendant relies upon entrapment he must expect "an appropriate and searching inquiry into his own conduct and predisposition as bearing on that issue". 287 U.S. 435, at 451. Surely that "searching inquiry" is properly directed at both the good and bad facets of defendant's life. From the opinion in the *Sorrells* case it appears that the defendant was a veteran of the World War and a former member of the 30th Division, A.E.F., was employed by the Champion Fibre Company at Canton, and had been "on his job continuously without missing a pay day since March, 1924." 287 U.S. 435, at 440. Had Sorrells been on trial in the District Court of Alaska, First Division, none of these facts would apparently have been admitted. See also on this issue, *Ryles v. United States* (C.A.10th, 1950) ("When the defense of entrapment is interposed, the predisposition and criminal design of the defendant becomes relevant and the government may introduce evidence relating to the conduct and the predisposition of the defendant as it bears upon the issue of entrapment. *The record and the reputation of the defendant become important upon this issue in rebuttal.*" 183 F.(2d) 944, at 945, emphasis supplied.) And see, *United States v. Becker,* supra, 62 F.(2d) 1007 at 1009. By these rulings, Defense counsel was seriously circumscribed in his efforts to present proper evidence as to the record

and background of the defendant. The elimination of such evidence was prejudicial error.

(b) So too, this Court and the jury might have had considerably more light on the activities of the government agents involved in this case had the Court permitted defense counsel to continue his examination of agent John Wendler concerning the contents of reports he had received from Warner. (R. 199-201.) Counsel was endeavoring to discover what Wendler had heard from his subordinates prior to laying the trap for the Rolling Wave. This was proper as bearing on whether appellant was entrapped. Compare the admission of hearsay in *Heath v. United States,* supra, 169 F.(2d) 1007 at 1010.

CONCLUSION.

1. The appellant was entitled to a judgment of acquittal at the close of the evidence. It had been conclusively established that the corrupt plan to steal fish and split the profits originated with John Lamb, an official agent of the United States, serving in an official function; that the government agents introduced this criminal design to appellant, then an innocent person having no intention to bribe any government official; that appellant was persuaded into the commission of the crime of bribery by the assiduous and persistent efforts of the government agent; and that the intention of the government agents who

were aware of the scheme, and who aided Lamb in completing it, was to arrest, prosecute and convict the appellant. The Court erred in refusing to direct a judgment of acquittal.

2. Assuming, *arguendo,* that some of the foregoing facts were sufficiently controverted to raise an issue for the jury, appellant was entitled to have the jury fairly and accurately instructed on the defense of entrapment. The instructions of the Court on this subject, and particularly the examples given to the jury in the Second Supplemental Instructions, were prejudicially erroneous, and require that the conviction be reversed.

3. The proposed instructions on behalf of the defendant, Nos. 1 and 2, were concise and accurate instructions on the subject of entrapment and the defendant was entitled to have the jury instructed accordingly. The material included in these instructions was not properly covered in the instructions which the Court gave.

4. The Court erred in preventing the appellant from introducing proper testimony as to his background and record, and in striking proper testimony as to the activities of the government agents. Every man has two sides to his character and record; by cutting off proper questions concerning the defendant, only a half picture of the defendant was displayed to the jury.

We respectfully submit that it would be "shocking to the sense of justice" and "against public policy"

to permit the judgment of conviction to stand. It should be reversed.

Dated, Anchorage, Alaska,
May 11, 1951.

Respectfully submitted,
KAY & ROBISON,
WENDELL P. KAY,
Attorneys for Appellant.

ZIEGLER, KING & ZIEGLER,
ROBERT H. ZIEGLER, SR.,
Of Counsel.

No. 12814

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

P. J. LYNCH,

Appellee.

P. J. LYNCH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Appeals from the United States District Court,
Eastern District of Washington,
Southern Division.**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

HARVEY ERICKSON,

United States Attorney, and

Attorney for Defendant and Appellant,

334 Federal Building,
Spokane, Washington.

VELIKANJE AND VELIKANJE, and
JOHN S. MOORE, JR.,

Attorneys for Plaintiff and Appellee,

415 Miller Building,
Yakima, Washington.

In the District Court of the United States for the Eastern District of Washington, Southern Division

Civil No. 386

P. J. LYNCH,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Comes now the plaintiff and for cause of action alleges and avers as follows, to wit:

1.

This action arises under Title 28, United States Code, Section 1346 (a) (1), and Title 28, United States Code, Section 1402 (a), as hereinafter more fully appears.

2.

That prior to the 29th day of April, 1944, the Washington Fruit & Produce Company, a corporation, was a duly authorized and existing corporation under the laws of the State of Washington, and that the Plaintiff herein was a stockholder in said corporation.

3.

That the Washington Fruit and Produce Company, a corporation, was engaged in the handling, growing, marketing, and warehousing of fresh fruits and vegetables and was also engaged in the cold storage handling of meats and other products

in the period immediately prior to its liquidation. That during the time of the corporate existence and some time prior to the time decision was made to liquidate, said corporation declared a Dividend in Kind to its stockholders of record, the fair value of said Dividend in Kind being treated as an ordinary dividend by said stockholders. That on or about the 29th day of April, 1944, said corporation was voluntarily liquidated. That storage accounts, if accruable, under accounting system followed would have had an accruable value [1*] of $37,-225.96 on April 29th, 1944. That subsequent to said corporation's liquidation, the plaintiff, and other former stockholders of said corporation, were assessed as transferees of said liquidated corporation, the sum of $34,670.12 excess profits taxes, and the sum of $5,637.48 declared value excess profits taxes, and as a result of said assessment, the plaintiff paid to the Collector of Internal Revenue $8667.53 excess profits taxes and $1221.98 interest thereon, and $1409.37 declared value excess profits taxes and $199.63 interest thereon, said taxes and interest being the plaintiff's 25% share of the total transferee assessments made against the former stockholders of the Washington Fruit and Produce Company. That said tax was assessed against such transferees, including plaintiff, as a result of increasing the income of said dissolved corporation for its fiscal period beginning July 1, 1943, and ending April 29, 1944, as follows: First, by increasing income of the corporation by the sum of

*Page numbering appearing at foot of page of original Certified Transcript of Record.

$8,939.79, which sum was the excess value received by the stockholders of the corporation on assets distributed to them as a Dividend in Kind over the basis of such assets to the corporation. Second, that income was increased $37,225.96 by alleging certain storage accounts to be accruable as income prior to liquidation.

4.

That said assessment was erroneous in taxing to the corporation (and thus to the plaintiff as transferee) any profit measured by the excess value the stockholders received on assets distributed as a Dividend in Kind over and above the basis of cost of said assets to the corporation. Such excess value, if any, was reported as income by the stockholders of record, as an additional dividend at the time of the distribution.

5.

That said assessment was erroneous in taxing to the corporation, (and thus to the plaintiff as transferee) storage alleged to [2] have been accrued in an amount of $37,225.96, when under the method of accounting followed by the taxpayer and for the most part by the fruit industry, the storage income has never been considered to be an accruable item.

That said corporation at no time during its existence ever followed the policy of accuring storage income and that it is the custom of similar businesses operating within the Yakima area not to anticipate storage income until the merchandise in storage has left the premises. That the corporation in its ranch operations uniformly followed the

practice of capitalizing actual expenditures made and that if any change is to be made in the method of accounting for storage income, consistency demands that only the cost of earning such deferred storage income be capitalized.

6.

The plaintiff herein paid such excess profits tax, declared value excess profits tax, and interest, on or about the 12th day of December, 1946, and subsequent thereto filed claims for the refund of said amount. That said claims were denied by letter dated February 3, 1949.

7.

That plaintiff waives any and all rights of recovery of that portion of the excess profits taxes, declared value excess profits taxes, interest as previously paid, and subsequent accrued interest, over and above $10,000.00.

Wherefore, plaintiff prays judgment against defendant as above set forth, together with interest at 6% per annum from December 14, 1946, but not to exceed a sum of $10,000.00, together with his costs and disbursements herein incurred.

VELIKANJE & VELIKANJE,

/s/ E. B. VELIKANJE,
/s/ S. P. VELIKANJE,
/s/ E. F. VELIKANJE,
/s/ JOHN S. MOORE, JR.,
Attorneys for Plaintiff.

[Endorsed]: Filed April 15, 1949. [3]

[Title of District Court and Cause.]

ANSWER

Answering the complaint herein, the defendant, by its attorney, Harvey Erickson, United States Attorney for the Eastern District of Washington, alleges as follows:

1. The allegations of Paragraph 1 are admitted.

2. The allegations of Paragraph 2 are admitted.

3. Except as hereinafter admitted or alleged, the allegations of Paragraph 3 are denied.

It is admitted that the Washington Fruit and Produce Company was engaged in handling, growing, marketing and warehousing of fresh fruits and vegetables and was also engaged in the cold storage handling of meats and other products immediately prior to its liquidation.

It is alleged on information and belief that on or about February 28, 1944, the corporation declared a dividend to its stockholders of record and that the dividend was paid to the stockholders and reported by them as ordinary income in 1944.

It is admitted that the corporation was voluntarily liquidated on or about April 29, 1944, and that its storage accounts, if accruable had a value of $37,225.96 on that date. [7]

It is also admitted that subsequent to the corporation's liquidation, transferee assessments were made against the plaintiff and other former stockholders of the corporation in the amounts alleged and that

plaintiff paid to the Collector of Internal Revenue a proportionate share of said assessments in the amounts alleged.

It is further admitted that the foregoing transferee assessments were made for the period and on the grounds alleged except it is denied that the dividend paid to stockholders was a dividend in kind.

4. The allegations of Paragraph 4 are denied except it is admitted that the stockholders reported the dividend paid to them as income.

5. The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 5.

6. The allegations of Paragraph 6 are admitted except it is alleged that the date of payment was December 13, 1946.

Wherefore, the defendant demands judgment dismissing the complaint on the merits and at plaintiff's cost.

/s/ HARVEY ERICKSON,
United States Attorney.

/s/ LLOYD L. WIEHL,
Assistant U. S. Attorney,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed August 16, 1949. [8]

[Title of District Court and Cause.]

ORDER FOR PRE-TRIAL CONFERENCE UNDER RULE 16

To Velikanje & Velikanje, Attorneys at Law, 415 Miller Building, Yakima, Washington.

To Harvey Erickson, United States Attorney, Federal Building, Spokane, Washington.

By virtue of Pre-trial Rule 16 of the Rules of Civil Procedure for the District Courts of the United States, you are hereby directed to appear before the undersigned Judge of the above-entitled Court, at Yakima, Washington, on Friday, November 4, 1949, at 1:30 p.m., to consider:

1. The simplification of the issues.

2. The necessity or desirability of amendments to the pleadings.

3. The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof.

4. The limitation of the number of expert witnesses.

5. Such other matters as may be of aid in the disposition of the action.

The Clerk of this Court is directed to forthwith serve this order upon the above named parties by mailing a copy thereof to their attorneys at the addresses disclosed by the record herein.

Dated this 17th day of October, 1949.

/s/ SAM M. DRIVER,
United States District Judge.

Mailed copies to attorneys 10/17/49.

/s/ A. A. LaFRAMBOISE,
Clerk.

[Endorsed]: Filed October 17, 1949. [9]

[Title of District Court and Cause.]

ORDER ON PRE-TRIAL CONFERENCE

The Court on its own motion does hereby vacate the setting of the above-entitled cause for pre-trial conference on November 4, 1949, at 1:30 p.m., and

It Is Ordered that said cause be and it is hereby set for pre-trial conference on Saturday, November 12, at 10:00 a.m.

Dated this 21st day of October, 1949.

/s/ SAM M. DRIVER,
United States District Judge.

[Endorsed]: Filed October 21, 1949. [10]

In the District Court of the United States for the Eastern District of Washington Southern Division

Civil No. 386

P. J. LYNCH,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter coming on for trial before the above-entitled court on March 20, 1950, and the court having heard the evidence and the arguments of counsel E. F. Velikanje and Thomas R. Winter for plaintiff and defendant, respectively, and being fully advised in the premises does now make the following

Findings of Fact

1.

This action arises under Title 28, United States Code, Section 1346 (a) (1) and Title 28, United States Code, Section 1402 (a).

2.

That prior to the 29th day of April, 1944, the Washington Fruit & Produce Company, a corporation, was a duly authorized and existing corporation under the laws of the State of Washington, and that

plaintiff herein was a stockholder in said corporation.

3.

That the Washington Fruit & Produce Company, a corporation, was engaged in the handling, growing, marketing and warehousing of fresh fruits and vegetables. That on or about February 28, 1944, said corporation declared a dividend in kind of 21,977 boxes of apples to its stockholders of record. That the fair value of said dividend in kind was treated as an ordinary dividend by said stockholders, who reported the same as income and paid income taxes thereon.

4.

That on or about April 29, 1944, said corporation was voluntarily liquidated, and subsequent thereto the plaintiff and other former stockholders of said corporation were assessed as transferees of said liquidated corporation, in additional sums for excess profits taxes and declared value excess profits taxes. That payments of said taxes together with interest were made by plaintiff and the other former stockholders, plaintiff paying 25% of the total as his share on the basis of stock ownership. That said taxes were assessed against said transferees, including plaintiff, as a result of increasing the income of said dissolved corporation for its fiscal period, beginning July 1, 1943, and ending April 29, 1944, as follows: First, by increasing the corporate income by the sum of $8,939.79, which sum was the excess value received by the stockholders of

the corporation on the assets distributed to them as a dividend in kind over the basis of such assets to the corporation; and Second, that income was increased $37,225.96 by ruling that certain storage accounts were accruable as income prior to liquidation.

5.

That the total assessments and payments resulting from such increase and ruling were $34,670.12 excess profits taxes, $5,637.48 declared value excess profits taxes, and interest thereon. That plaintiff, as transferee, was assessed and thereafter paid as his proportionate share, the sum of $8,775.97 excess profits taxes plus interest in the amount of $1,113.54 and $1,422.45 declared value excess profits taxes plus interest in the amount of $186.55. That of said sums assessed and paid by plaintiff, $195.32 on declared value excess profits taxes with interest of $25.62 and $1,714.29 on excess profits taxes with interest of $217.52 were the amounts resulting from the increase of the corporate income by $8,939.79 as a result of disallowing the dividend in kind as a true dividend, less subsequent adjustments.

6.

That said dividend in kind was a true dividend, taxable as income to the stockholders, including plaintiff. That the amounts received by the stockholders in the sales of said assets over and above the basis of such assets to the corporation did not constitute income to the corporation. That said assessment as income to the corporation, and there-

after against the stockholders as transferees, including plaintiff, was erroneous and wrongful.

7.

That the increase of corporate income in the amount of $37,225.96 as the result of accruing storage accounts as income of the corporation as of the date of liquidation was correct. That the assessments thereafter made against the stockholders, including plaintiff, as transferees of the corporation, for such increase was correct and lawful. That the portion of the total assessments and payments attributable to said increase were correctly assessed and paid.

The Court having heretofore made and entered its Findings of Fact does herewith make the following

Conclusions of Law

1.

That the plaintiff is entitled to recover of the defendant the sum of $195.32 declared value excess profits tax with interest of $25.62 and $1,714.29 excess profits tax with interest of $217.52 or a total of $2,152.75, together with interest thereon as provided by law, said recovery being upon the erroneous assessment against said corporation (and plaintiff as transferee) any profit measured by the excess value the stockholders received on assets distributed as a dividend in kind over and above the basis of cost of said assets to the corporation.

2.

That the plaintiff is not entitled to recover of the defendant upon plaintiff's claim for recovery upon the increase of corporate income as the result of accruing storage accounts as income of the corporation as of the date of liquidation.

3.

That the plaintiff is entitled to recover of the defendant, plaintiff's costs and disbursements in the bringing of this action.

Done in Open Court this 30 day of Oct., 1950.

/s/ SAM M. DRIVER,
United States District Judge.

Presented by:

/s/ E. F. VELIKANJE, of
VELIKANJE & VELIKANJE,

JOHN S. MOORE, JR.,
Counsel for Plaintiff.

Chambers of
Sam M. Driver
United States District Judge
Spokane 6, Washington

July 26, 1950

Velikanje & Velikanje
Attorneys at Law
Yakima, Washington

Mr. Harvey Erickson
United States Attorney
Spokane, Washington

Re: P. J. Lynch v. United States, No. 386, and Nos. 387 through 392.

Gentlemen:

In the above cases two main questions were presented for decision: namely, first, whether a dividend in kind declared by the corporation should be declared invalid and ineffective so that the income represented by appreciation in the value of the apples should be charged to the corporation rather than to the stockholders; and, second, whether the income of the corporation from receipts for storage of the property for the United States Government should be charged as income against the corporation as having accrued prior to liquidation of the corporation in April, 1944. The court has come to the conclusion that the taxpayer plaintiff should prevail as to the first issue and the government should prevail as to the second.

While I think the question is a very close and difficult one, it is my view that the declaration of

dividends consisting of apples owned by the corporation, which the corporation was authorized to make under Section 115 of the Internal Revenue Code, was a genuine, rather than a sham, transaction. There had been no prior orders for the apples and no prior sale or arrangements for sale, so that the stockholders were not, in my view, acting as a mere conduit for the conveyance of title in the carrying out of a pre-arranged sale. I think without question the primary motive for the declaration of the dividend was to reduce the income tax liability of the corporation, but assuming, as I have done, that the declaration of the dividend was a genuine, legitimate transaction, the mere fact that it was motivated by a desire to reduce taxes would not thereby render it invalid.

As to the matter of storage charges, I think that since the contract provides that storage shall be computed on a monthly basis the method of accounting which the Commissioner required the taxpayer to adopt more truly reflected its income than would have been done by not accruing the storage charges until the goods were taken out of storage.

Findings and judgments may be presented in accordance with the views herein expressed.

Sincerely yours,

SAM M. DRIVER,
United States District Judge.

SMD:jr

[Endorsed]: Filed October 30, 1950.

In the District Court of the United States for the Eastern District of Washington, Southern Division

Civil No. 386

P. J. LYNCH,

Plaintiff,

vs.

UNITED STATES OF AMERICA

Defendant.

JUDGMENT

The above-entitled matter coming on for trial before the above-entitled court on March 20, 1950, and the court having heard the evidence and the arguments of counsel, E. F. Velikanje for plaintiff and Thomas R. Winter for defendant, and having heretofore made and entered its Findings of Fact and Conclusions of Law, and being fully advised in the premises,

It is, Now, Here Ordered, Adjudged and Decreed that the plaintiff, P. J. Lynch, be and he is hereby granted judgment against the defendant, United States of America, in the sum of $2,152.75, together with interest thereon as provided by law, together with plaintiff's costs and disbursements herein to be taxed.

It is Further Ordered, Adjudged and Decreed that plaintiff's action against the defendant for recovery of tax payments made as the result of accruing storage accounts of the Washington Fruit and Produce Company as of April 29, 1944, the

date of liquidation of said corporation, be, and the same is, hereby dismissed with prejudice.

Done in Open Court this 30th day of October, 1950.

/s/ SAM M. DRIVER,
United States District Judge.

Presented by:

/s/ E. F. VELIKANJE,
JOHN S. MOORE, JR.,
Counsel for Plaintiff.

[Endorsed]: Filed October 30, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is Hereby Given that the United States of America, the defendant above named, by Harvey Erickson, United States Attorney for the Eastern District of Washington, and Frank R. Freeman, Assistant United States Attorney for said District, does hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 30th day of October, 1950.

Dated this 27th day of December, 1950.

/s/ HARVEY ERICKSON,
United States Attorney.

/s/ FRANK R. FREEMAN,
Assistant U. S. Attorney.

Receipt of Copy Acknowledged.

[Endorsed]: Filed December 27, 1950.

[Title of District Court and Cause.]

STATEMENT OF POINTS RELIED UPON ON APPEAL

The appellant states that in its appeal to the United States Court of Appeals for the Ninth Circuit from the judgment entered in the above-entitled case on October 30, 1950, pursuant to the provisions of Rule 75(d) of the Rules of Civil Procedure, it intends to rely on the following points:

1. The trial court erred in finding that the dividend in kind was a true dividend.

The trial court erred in failing to find that said dividend in kind was a sham.

2. The trial court erred in finding that the sale of the dividend apples was made by the stockholders.

The trial court erred in failing to find that said sale was made by the corporation.

3. The trial court erred in finding that the net proceeds from the sale of the dividend apples did not constitute taxable income to the corporation to the extent that such proceeds exceeded the corporation's basis for the apples.

The trial court erred in failing to find that the excess of the net sales proceeds over the corporation's basis for the applies represented taxable income to the corporation.

4. The finding of fact No. 6, made by the trial

court, is not supported by the evidence and is contrary to law.

5. The trial court erred in failing to find and conclude that the declaration of the dividend in kind constituted an anticipatory assignment of income by the corporation.

6. The trial court erred in finding that the assessment against plaintiff, as transferee of the corporation, was erroneous and unlawful.

The trial court erred in failing to find that said assessment was proper and lawful.

7. The trial court erred in granting judgment for plaintiff on the dividened in kind issue.

The trial court erred in failing to grant judgment for the defendant on said issue.

Dated this 9th day of January, 1951.

/s/ HARVEY ERICKSON,
United States Attorney,

/s/ FRANK R. FREEMAN,
Assistant U. S. Attorney,
Attorneys for Defendant-Appellant.

[Endorsed]: Filed January 10, 1951.

[Title of District Court and Cause.]

NOTICE OF CROSS APPEAL

Notice Is Hereby Given that P. J. Lynch, the plaintiff above-named, by and through his attorneys Velikanje & Velikanje and John S. Moore, Jr., does hereby cross-appeal to the Circuit Court of Appeals for the Ninth Circuit from that portion of the final judgment entered in this action contrary to the plaintiff's prayer of his complaint, which judgment was entered on the 30th day of October, 1950.

Dated this 28th day of December, 1950.

VELIKANJE & VELIKANJE,

/s/ E. F. VELIKANJE,

/s/ S. P. VELIKANJE,

/s/ JOHN S. MOORE, JR.,
Attorneys for Plaintiff.

Copy mailed.

[Endorsed]: Filed December 28, 1950.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH CROSS-APPELLANT INTENDS TO RELY ON APPEAL

The plaintiff-appellee and cross-appellant states that in his appeal to the United States Court of Appeals for the Ninth Circuit from the judgment

entered in the above-entitled case on October 30, 1950, pursuant to the provisions of Rule 75(d) of the Federal Rules of Civil Procedure, he intends to rely on the following points:

1. The trial court erred in finding that the increase of corporate income by accruing storage accounts as income of the corporation was correct.

The trial court erred in failing to find that said increase was incorrect and unlawful.

2. The trial court erred in finding that the assessments against the stockholders, including plaintiff, as transferees of the corporation for the increase of corporate income by accruing storage accounts was correct and lawful.

The trial court erred in failing to find that said assessments against the stockholders, including plaintiff, were erroneous and unlawful.

3. The trial court erred in finding that the portion of the total assessments and payments attributable to the increase of corporate income by accruing storage accounts was correctly assessed.

The trial court erred in failing to find that the portion of the total assessments and payments attributable to the increase of corporate income by accruing storage accounts was wrongfully and erroneously assessed and collected.

4. The finding of fact number 7 made by the trial court is not supported by the evidence and is contrary to law.

5. The trial court erred in failing to find that

said corporation should not have been required to accrue such storage accounts as income to the corporation as of the date of corporate liquidation.

6. The trial court erred in finding that plaintiff was not entitled to recover upon plaintiff's claim relative to the increase of corporate income by accruing storage accounts.

7. The trial court erred in granting judgment for the defendant on the issue as to increasing corporate income by accruing storage accounts.

The trial court erred in failing to grant judgment for the plaintiff on the issue as to increasing corporate income by accruing storage accounts.

Dated this 16th day of January, 1951.

VELIKANJE & VELIKANJE,

/s/ E. F. VELIKANJE,

/s/ S. P. VELIKANJE,

/s/ JOHN S. MOORE, JR.,

Attorneys for Plaintiff-Appellee and Cross-Appellant.

[Endorsed]: Filed January 16, 1951.

United States District Court, Eastern District of Washington, Southern Division

Civil No. 386

P. J. LYNCH,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Record of Proceedings at the Trial
On March 20, 1950

Before: Honorable Sam M. Driver,
United States District Judge.

Appearances:

For the Plaintiff:

E. F. VELIKANJE, of
VELIKANJE & VELIKANJE, and
JOHN S. MOORE, JR.,
Both of Yakima, Washington.

For the Defendant:

THOMAS R. WINTER,
Special Assistant to the Chief Counsel, Bureau of Internal Revenue, 713 Smith Tower Building, Seattle, Washington.

HARVEY ERICKSON,
United States Attorney for the Eastern District of Washington, Spokane, Washington, of counsel for the defendant. [11]

Be It Remembered that the above-entitled cause came on for trial at Yakima, Washington, on the 20th day of March, 1950, before the Honorable Sam M. Driver, United States District Judge, sitting without a jury, the plaintiff appearing by E. F. Velikanje, of Velikanje & Velikanje, and John S. Moore, Jr., both of Yakima, Washington, the defendant appearing by Thomas R. Winter, Special Assistant to the Chief Counsel, Bureau of Internal Revenue, 713 Smith Tower Building, Seattle, Washington; whereupon, the following proceedings were had and done, to wit:

The Court: Are we ready on Plath and Lynch and Bloxom against the United States?

Mr. Velikanje: Yes, your Honor; I thought just the decision [13] in the Lynch case will be determinative of the others, except the one of M. Gail Plath relating to the gift tax.

* * *

The Court: The other cases seem to have common questions. As I remember the pleadings, speaking generally, the excess profits tax and the declared value excess profits tax of this liquidated corporation, Washington Fruit and Produce Company, was increased on two accounts; one was that it is the contention of the government that the storage

charges should have been accrued as of the date of liquidation rather than being carried over, and the other was that some addition should be made in income of the corporation for its last year of existence because of the declaration of a so-called dividend in kind of apples that were distributed to the stockholders. [14]

Mr. Winter: Your Honor, here are the issues which we agreed upon in the pretrial conference. If your Honor will recall, we held a pretrial conference in your office, and your Honor instructed us to draw a pretrial order. I advised counsel I would submit the issues and the government's contentions, and I did, and apparently that's as far as we got, and here is the government's contentions in writing that I submitted to counsel; now, that's all we have as far as the government has on the pretrial order. It sets forth the government's contentions on those issues, which are the full issues in the case.

The Court: Well, I found that in Portland, Oregon, they seem to make pretrial conferences work where they get the lawyers in and send them out and tell them to get up an order, but I don't seem to be as good a disciplinarian; the lawyers go out and forget about it, or get busy doing something else. Have you looked over this statement of issues?

Mr. Velikanje: Yes, your Honor, and I believe those are the issues to be involved, just as you had stated them.

The Court: As I understand, you wish to take up the Lynch case first as determinative of the cases of the class other than the Plath case?

Mr. Velikanje: Yes.

Mr. Winter: That's counsel's desire; we have no preference. We have witnesses on both who will have to remain. [15]

* * *

JOHN M. BLOXOM

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Velikanje:

Q. Your name is John Bloxom?

A. Yes.

Q. Mr. Bloxom, in the spring of 1944 what were your duties, or what was your business?

A. I was secretary-treasurer of the Washington Fruit and Produce Company.

Q. Was that a corporation?

A. It was a corporation until May 1, yes.

Q. You are also one of the parties plaintiff in this series of suit, are you not? A. Yes.

Q. You say you were secretary-treasurer?

A. Yes.

Q. That was a corporation; who was the president of the corporation?

A. Fred B. Plath.

Q. Is Mr. Plath now living? A. No. [19]

Q. Do you know the date of his death?

A. October 22, 1948.

Q. Mr. Bloxom, in the year—I believe this is stipulated——

(Testimony of John M. Bloxom.)

A. Pardon me; I'm not exactly sure of that date.

Q. I believe that's correct. On February 28, 1944, did the corporation declare a dividend?

A. Yes.

Q. Were you present at the meeting of the stockholders or directors? A. Yes.

Q. Were you a director in the corporation?

A. I believe I was made a director at that same meeting.

Q. You were made a director; did you participate at this meeting? A. Yes.

Q. Will you just explain to the Court what happened at that meeting?

Mr. Winter: If the Court please, the minutes of the Board of that date is the best evidence.

The Court: Yes, if they're available I should think they would be.

Mr. Winter: I think they are available.

The Court: What meeting is this?

Mr. Velikanje: February 28, 1944.

Mr. Winter: Have you made copies of all the minutes? [20]

Mr. Velikanje: I have some copies. I will make copies of them.

Mr. Winter: Why don't we identify the entire minute book, and then we'll take out and substitute what copies we need. That might save some time.

Mr. Velikanje: I'm agreeable to stipulating that.

The Court: Well, the record may show that that is stipulated, then, and counsel can substitute copies.

Mr. Winter: That's agreeable.

(Testimony of John M. Bloxom.)

Mr. Velikanje: We offer in evidence the copies of the minutes of the Washington Fruit and Produce Company.

Mr. Winter: No objection.

(Whereupon, the minute book was marked Plaintiff's Exhibit 1 for identification.)

The Court: Is that the minute book of both the directors and stockholders?

Mr. Velikanje: Yes. I believe it is the only minute book that you have, is it not?

A. Yes.

The Court: It covers both the stockholders' meetings and the directors' meetings?

A. Yes.

The Clerk: Is it being admitted?

The Court: Well, I think just the minutes of February 28, 1944. If there's no objection that will be [21] admitted.

Mr. Winter: No objection.

The Court: I wonder if you shouldn't give that a letter designation, Mr. LaFramboise, 1-a, so that we can keep a record of what is going in.

(Whereupon, the minutes of February 28, 1944, were admitted in evidence as Plaintiff's Exhibit No. 1-a.)

Q. (By Mr. Velikanje): Mr. Bloxom, I hand you plaintiff's Exhibit 1-a. Is that the minutes of the meeting that you referred to on February 28, 1944?

(Testimony of John M. Bloxom.)

A. The trustes' meeting, yes.

Q. It's the trustees' meeting? A. Yes.

Q. Can you for the Court's information refer to that exhibit and tell what that says? I don't know whether you'd like it read into the record, Mr. Winter, or whether you will object to Mr. Bloxom testifying at this time so that this matter can get before the Court, unless the Court desires to read it.

Mr. Winter: It's immaterial to me, whatever the Court desires to do.

The Court: Well, it's in evidence now. Suppose I read it, or in order that Mr. Winter may follow it——

Mr. Velikanje: Well, I think Mr. Winter is [22] very familiar with it.

The Court: I suggest that you read it, and then we can all hear it, as if you were reading it to the jury.

(Whereupon, Mr. Velikanje read Plaintiff's Exhibit 1-a to the Court.)

Q. (By Mr. Velikanje): Mr. Bloxom, on this fruit, how was that fruit handled by your warehouse?

A. Well, each of those lots was put in a separate place by itself at the time it was received from the grower the previous fall, and kept separated until it was packed. I believe there was one lot there that had been packed but was still identifiable by its own number on each box.

Q. Were each one of these lots identifiable at all times? A. Yes.

(Testimony of John M. Bloxom.)

Q. When would this fruit lose its identity——

A. Well, if it was loaded——

Q. ——if ever?

Mr. Winter: Now, if the Court please, that's calling for a conclusion.

The Court: Yes, I rather think it is, sustain the objection.

Q. I'll withdraw my question. Mr. Bloxom, could this fruit be traced by lot number even after it was shipped?

A. It could if it was shipped as a packed box. Some of it was shipped in bulk, and after it left our warehouse it [23] couldn't be traced if it was shipped in bulk.

Q. You say some was shipped in bulk?

A. Yes.

Q. But you also say that any lots that were shipped that were packed and shipped could be followed? A. Yes.

Q. How was that done?

A. A separate identifying number on each box designated the lot from which it came.

Q. After this dividend in kind was declared was anything further done relative to this fruit?

A. The stockholders made a contract with the Washington Fruit and Produce Company to dispose of the apples.

Mr. Winter: Now, I'll object to this; the contract is the best evidence.

Mr. Velikanje: I have the contract here and will have it identified.

(Testimony of John M. Bloxom.)

The Court: I assume this is just preliminary, and you can produce the contract?

Mr. Velikanje: That's right.

(Whereupon, agreement dated February 28, 1944, was marked Plaintiff's Exhibit No. 2 for identification.)

Q. (By Mr. Velikanje): Mr. Bloxom, I hand you plaintiff's identification 2; what is that? [24]

A. That's an agreement between the stockholders and the Washington Fruit and Produce Company to dispose of these apples for the stockholders.

Mr. Velikanje: We offer it in evidence.

Mr. Winter: No objection.

The Court: It will be admitted.

(Whereupon, Plaintiff's Exhibit No. 2 for identification was admitted in evidence.)

Q. Mr. Bloxom, do you know in any way that this agreement was not carried out?

A. No, so far as I recall it was carried out right to the letter.

Q. Did you have similar agreements with independent growers? A. Yes.

(Whereupon, accounting record was marked Plaintiff's Exhibit No. 3 for identification.)

Q. Mr. Bloxom, I hand you plaintiff's identification 3. Will you tell the court what that is?

A. That was the Washington Fruit and Produce Company's bookkeeper's accounting on the handling and sale of this fruit, to the stockholders.

(Testimony of John M. Bloxom.)

Q. Do you know whose handwriting that is?

A. Miss Walker.

Q. Is she still in your employ?

A. No. [25]

Q. What was her capactiy at the Washington Fruit and Produce Company?

A. She was a bookkeeper.

Q. Were these papers all in your possession until just a few days ago? A. Yes.

Q. And under your control? A. Yes.

Q. And you delivered them to me at that time?

A. Yes.

Q. These are part of the original records of the old Washington Fruit and Produce Company, is that correct? A. Yes.

Mr. Winter: Have you any copies of these?

Mr. Velikanje: You have copies of those attached to the former records furnished to you.

Mr. Winter: I don't have them.

Mr. Vilikanje: You have copies of them on that report that was delivered to you. You were given photostatic copies on April 2, 1946.

The Court: If this is to be part of the record you'll have to speak up so the reporter can hear you.

Mr. Winter: I was just asking counsel if he had copies of the exhibits. May I ask the witness—have you offered this? [26]

Mr. Velikanje: Yes, I'm offering it.

Mr. Winter: May I ask the witness a question?

The Court: Yes, all right.

Voir Dire Examination

By Mr. Winter:

(Testimony of John M. Bloxom.)

Q. Referring to what has been marked for identification plaintiff's Exhibit 3, Mr. Bloxom, you say this is a statement as to the receipts and charges made against the stockholders; is it a settlement sheet of this transaction, is that what it's supposed to be? A. Yes.

Q. Did you prepare the exhibit?

A. No, that was prepared by our bookkeeper; that's her original pencil accounting to us, and I think Mr. Velikanje had typewritten copies made of that.

Q. And who was the bookkeeper?

A. Miss Walker.

Q. She's no longer with your company?

A. No.

Q. Is she in Yakima?

A. Well, so far as I know she is here in Yakima.

Mr. Velikanje: Yes, she is in Yakima, I'll state that to you.

Q. Does this exhibit show what orders for apples were on hand at the time the dividend, the so-called divident in kind was——

A. There were no orders on hand. [27]

Q. I asked you if the exhibit showed any orders on hand. A. No.

Q. Does it only have reference to these lot numbers of apples?

A. Yes, names of the owners that brought the apples in, which were in the minutes of the meeting of February 28.

Q. Well, does it show the apples which were substituted for the lot which wasn't there when they

(Testimony of John M. Bloxom.)

come to dispose of the apples?

A. I don't know.

Q. Huh? A. I don't know.

Q. In any event, that's a settlement sheet made by the company's bookkeeper with the company's stockholders? A. That's right.

Q. Was that settlement sheet made with any other representative of the stockholders, any bookkeeper of the stockholders?

A. I don't understand the question.

Mr. Winter: I think that's all. We have no objection to it.

Mr. Velikanje: We offer it in evidence, your Honor.

The Court: It will be admitted.

(Whereupon, Plaintiff's Exhibit No. 3 for identification was admitted in evidence.)

Mr. Velikanje: We would like on several of these, [28] this is journal records, and we would like to make copies of these and substitute them later.

Mr. Winter: Yes; would you make copies for me? I would appreciate it very much. We have no objection to substituting copies.

The Court: Copies may be substituted, then. That will apply also to the minute book, I assume.

Direct Examination

(Continued)

By Mr. Velikanje:

Q. Mr. Bloxom, at the time of declaring this

(Testimony of John M. Bloxom.)

dividend in kind did the Washington Fruit have any orders on hand for fruit, unfilled? A. No.

Q. Did the Washington Fruit ultimately sell all of this fruit? A. Yes.

Q. For the stockholders? A. Yes.

Q. And account to them? A. Yes.

Mr. Winter: Of course we object and ask that the last question be stricken in that it assumes the issue which is here for determination, as to whether or not they sold for the stockholders or for themselves.

The Court: Well, I take the answer to mean they did sell the fruit and account to the stockholders. [29]

Q. Such sale was made under that agreement, which was Exhibit 2? A. Yes.

Q. Mr. Bloxom, did you engage in the year 1944 in busines other than the storage and handling of fruit? A. Yes.

Q. What other business were you engaged in at that time? A. Individually, or——

Q. As a corporation.

A. As a corporation? We were engaged in the storing of merchandise for the government, other than fruit.

(Whereupon, storage contract was marked Plaintiff's Exhibit No. 4 for identification.)

Q. I hand you plaintiff's identification 4. What it that?

A. That's a storage contract which the corpora-

(Testimony of John M. Bloxom.)

tion had with the Federal Surplus Commodities Corporation.

Q. And was this in effect in the spring of 1944?

A. I think it was still in effect at that time, yes.

Q. You had meat and other products in storage for the government at that time? A. Yes.

Mr. Velikanje: We offer this in evidence.

Mr. Winter: No objection.

The Court: It will be admitted.

(Whereupon, Plaintiff's Exhibit No. 4 for identification was [30] admitted in evidence.)

Q. Mr. Bloxom, was this corporation liquidated in the last of April of 1944? A. Yes.

Mr. Winter: You mean about the last, don't you?

Mr. Velikanje: Yes, I think it was the 29th; I think that's been admitted in the answer, your Honor, that this corporation was liquidated as of the 29th of April, 1944.

Q. (By Mr. Velikanje): Mr. Bloxom, did the Washington Fruit and Produce Company store fruit, meat, and other products? A. Yes.

Q. When did you come in as a member of this corporation?

A. I had stock transferred to my name on the books of the corporation I believe on December 30, 1943.

Q. December 30, 1943; during the time that you were with the corporation were you familiar with its methods and practices of accounting?

(Testimony of John M. Bloxom.)

A. Yes.

Q. What was the procedure or method and practice of accounting of the Washington Fruit and Produce Company as it related to the handling of storage charges?

Mr. Winter: We'll object to that; the books are the best evidence as to the method of accounting. He only became a stockholder December, 1943; he's not the bookkeeper; [31] he's not the accountant.

Mr. Velikanje: He was the secretary-treasurer.

The Court: Are the books available here?

Mr. Velikanje: No, they're not.

Mr. Winter: We'll concede that they reported on an accrual basis of accounting. Is that what you intend to prove by the witness?

Mr. Velikanje: No.

Mr. Winter: Do you have your income tax return here? That will show the basis of accounting.

The Court: I'm not sure whether the question contemplates a method of accounting for income tax purposes.

Mr. Velikanje: For corporate procedure; not necessarily for income tax, but as to their corporate procedure.

Mr. Winter: They've got to report in the income tax report on the basis their books are kept on; they can't keep their books on a cash receipt basis and report on an accrual basis, nor can they change without permission. We submit the answer to the question calls for a conclusion of the witness, and that the books are the best evidence.

(Testimony of John M. Bloxom.)

The Court: I think the books are the best evidence, unless they're not available. [32]

Mr. Velikanje: Well, they're not available.

The Court: In view of the fact this is a trial before the court I'll admit the evidence, reserving your right to strike it, Mr. Winter. On that basis you may proceed. The record may show that this line of questioning and testimony is over the objection of government counsel.

(Pending question read by the reporter.)

A. We charged storage on each item at the time it was shipped from our plant.

Q. Was any storage accrued on a monthly basis?

A. No.

Q. Mr. Bloxom, how long have you been in the fruit industry in Yakima?

A. About twenty-seven years.

Q. Would you just tell the Court what your experience has been in the fruit industry in Yakima?

A. With respect to——

Q. What companies you worked with, and what your interests were.

A. I was with the Perham Fruit Company for about twenty years of that twenty-seven, and with the Washington Fruit and Produce Company the other seven years.

Q. What were your duties with the Perham Fruit Company?

A. I was assistant general manager, and treasurer. [33]

(Testimony of John M. Bloxom.)

Q. During those years were you familiar with the accounting methods used and employed by the Perham Fruit Company relating to the charging of storage? A. Yes.

Q. What were their methods?

A. The same as the Washington Fruit and Produce Company; they charged storage on each shipment at the time it was shipped from the cold storage plant.

Q. Did they ever accrue storage charges monthly or prior to being shipped out? A. No.

Q. Are you familiar with the methods as used on Produce Row or within the Yakima Valley as to the handling of accounting relating to storage charges, other than the two businesses you've mentioned?

A. So far as I know all fruit storage companies handle the charging of their storage the same way that we do.

Q. Mr. Bloxom, in the spring of 1944 approximately how much in dollars of government merchandise were you storing?

A. As I recall we figured its value at between two and three million dollars.

Q. Did you attempt to secure insurance on this merchandise?

A. Yes, we attempted to secure a certain kind of insurance on it to protect us in case of our negligence that would cause any damage or destruction to the merchandise. [34]

Q. Was this highly perishable merchandise?

(Testimony of John M. Bloxom.)

A. Some of it was highly perishable, and some to a lesser extent. It was all perishable, however.

Q. How much insurance were you able to obtain? A. We obtained a million dollars only.

Q. Did you attempt to secure additional insurance?

A. We attempted to secure two million dollars.

Q. But you were unable to?

A. That's right.

Q. Now, you say that you attempted to secure insurance to guard you against your negligence. What might that negligence consist of?

Mr. Winter: We object, if the Court please; I don't see the relevancy and materiality of this line of questioning.

The Court: Well, I'm not familiar enough with the issues to know what it is either.

Mr. Velikanje: My thoughts are this, your Honor: I want to show that under this marketing contract there was a possibility of damage or injury resulting to this merchandise that was in here for storage, until such time as it was shipped out.

Mr. Winter: Well, there's always that hazard on every storage contract. What does that have to do with it? [35]

The Court: Part of the amount in controversy has to do with storage on government property?

Mr. Velikanje: Yes.

The Court: I'll overrule the objection.

A. Our men might carelessly push a pile of boxes over against a pipe and break it, causing am-

(Testimony of John M. Bloxom.)

monia to escape and ruin all the government merchandise in a room. That's one.

Q. Was this merchandise all under cold storage?

A. Yes.

Q. Do you know what temperatures had to be maintained on the majority of it?

A. Part of it was zero, and part of it was thirty degrees.

Q. Mr. Bloxom, on this fruit on which you testified as to the dividend in kind, where did that fruit come from?

A. It came from growers in this area from whom we bought the fruit previous.

Q. The corporation had bought the fruit outright, had they not?

A. Prior to that date we had bought it and the corporation owned it.

Q. And I believe you also testified that you handled other fruit for other independent growers in exactly the same manner as it was handled for these trustees?

Mr. Winter: Do you mean in exactly the same manner, they would buy it outright [36] themselves?

Q. No, handling it in sale and delivery, it was packing, sale and delivery.

A. We bought some fruit from the growers, and for other growers we handled the packing and the sale of their fruit for their account, and accounted to them after it was disposed of.

Mr. Velikanje: That's all; you may inquire.

(Testimony of John M. Bloxom.)

Cross-Examination

By Mr. Winter:

Q. Mr. Bloxom, you say you became a stockholder of this corporation about December, 1943?

A. That's the time the stock was transferred to my name on the books.

Q. Who did you acquire your stock from, your father?

A. No, part of it was on the books in the name of Mr. Barnes, and part in the name of Mr. Plath, I believe, at the time I acquired it.

Q. I see. Well, now, what method of accounting was used by the corporation in keeping its books; was it the accrual method of accounting, or the cash receipts and disbursements method?

A. Well, it was what the Revenue Bureau I think would call the accrual method.

Q. In other words, you accrued all of your wages as they became due; I mean you accrued all the wages for operational costs? [37]

A. We paid the wages when they became due.

Q. Yes; well, you accrued all items, as any item accrued you took it on your books, didn't you?

A. No.

Q. What? A. No, not necessarily.

Q. Well, didn't you accrue the vacation pay of the employees? A. Yes.

Q. And all other items——

The Court: I'm not sure I understand just how that would be accomplished.

(Testimony of John M. Bloxom.)

Mr. Winter: They accrued a liability for vacation pay, your Honor.

A. I'd like to explain that particular item.

The Court: Well, your counsel can ask you about that. Just answer the questions on cross-examination.

Q. On what yearly basis did you file your income tax returns; was it on the calendar year or the fiscal year basis?

A. Fiscal year ending June 30.

Q. June 30 of each year? A. Yes.

Q. At what time of the year, approximately between what dates would you receive apples for storage, ordinarily?

A. During the fall months.

Q. During the fall months; that's September and October? [38] A. Yes, mostly.

Q. How early in September does the season usually start? A. The first.

Q. And ends up about when, in this area?

A. Late October.

Q. In other words, all of your apples would be stored during that particular two month period, approximately all of them? A. Most of them.

Q. How long ordinarily did you keep apples, and how long can you keep them in storage, approximately?

A. Some varieties up until the following July and August.

Q. Well, the majority of the apples are dis-

(Testimony of John M. Bloxom.)

posed of before June 30 of the succeeding year, aren't they? A. The majority, yes.

Q. And it's just a few varieties and a few late apples and winter apples that can keep beyond that time? A. Ordinarily.

Q. Ordinarily, yes. In other words, they spoil after that time, don't they?

A. Most of them do.

Q. If you don't have the bulk of them out by June 30 you're carrying a lot of it to the dump?

A. Outside of Winesaps that's true, yes.

Q. Now, the corporation's business, at least one of its businesses, was to store apples for customers, for growers? [39] A. Yes.

Q. As I understand it you'd enter into an agreement to store their apples at a certain figure, and then you would pack them and ship them for them?

A. That's right.

Q. And you would make an accounting to them of your costs of storage, or costs of treating, and your costs of loading, and your overhead costs, and bill them for that?

A. We had charges covering those items.

Q. The charges included all of those items?

A. Yes.

Q. Including the corporation's profit, right?

A. Theoretically, yes.

Q. And ordinarily you also, the corporation also bought considerable apples for their own account, did they not? A. That's right.

Q. Did the corporation have any orchards?

(Testimony of John M. Bloxom.)

A. Yes.

Q. And when you would bring in a lot, say, for John Jones it would be given a lot number, is that right? A. Yes.

Q. And supposing that lot was in bulk, would that be put in a bin with other apples of the same type and character? A. No.

Q. You'd keep that separate because those were his apples, is [40] that right?

A. Right. Whether we had bought them or not they would be kept separate.

Q. And you'd give a lot number to those apples?

A. Well, you would not have acquired a lot number yet; the name would be on the lot.

Q. Well, on February 28, 1944, the corporation owned considerable more than the 21977 boxes of apples, didn't they? A. I don't know.

Q. What?

A. I don't know. I don't think they did, though.

Q. Was that all of the apples that they owned at that time?

A. I say, I don't know, but I'm under the impression without checking the records that that's nearly all they owned at that time.

Q. That was nearly all they owned?

A. I'd have to check to be sure.

Q. Well, in prior years the practice was to sell the apples for their own account, wasn't it?

A. For prior years their practice was the same

(Testimony of John M. Bloxom.)

as that year; they bought some and sold some for the growers.

Q. Did you ever make a distribution in kind of apples during any other year except this liquidation year? A. No, but at the time——

Q. Who suggested the liquidation of apples? Was it Mr. Boyd, [41] your accountant?

A. No.

Q. Who suggested it? A. I did.

Q. Were you familiar with several of the other liquidations in kind of situations that Mr. Boyd had recommended?

A. I was familiar with a couple of different cases.

Q. That Mr. Boyd was the accountant for?

A. Not necessarily, no.

Q. Well, he happened to be the accountant for those corporations, was he not?

A. No, those I had known about I believe Mr. Boyd had told me about it previously.

Q. Yes; in other words, the suggestion of the liquidation in kind came from Mr. Boyd, didn't it?

A. No, I brought it up.

Q. You just said he told you about them.

A. That was before I went with the Washington Fruit and Produce Company.

Q. But the corporation never attempted to make a liquidation or dividend in kind up until this liquidation year, is that right?

A. I can't answer that question. I wasn't with the corporation part of that year. I don't think so.

(Testimony of John M. Bloxom.)

Q. What you just said, you didn't know of any liquidation in [42] kind prior to that time?

A. I didn't know of any.

The Court: When did you start to work for this corporation? A. September 1, 1943.

The Court: And you got your stock in December?

A. That's right.

Q. (By Mr. Winter): The agreement, Exhibit 2, the contract with the stockholders, was executed right at the same time as the liquidating or the dividend in kind was voted, wasn't it?

A. Yes.

Q. And it was understood that if you voted a dividend in kind that you would immediately enter into a contract and the corporation would sell the apples?

A. It was no doubt discussed at that meeting.

Q. Yes. In other words, it was understood that that was the procedure that you were going to take, isn't that right? A. I think that's right.

Q. You say that the apples were identifiable as long as they were boxed, after they left your plant, is that right? A. That's right.

Q. And if they were bulk of course they couldn't be identified except if the lot numbers were kept separate?

A. They were identifiable up until the time they were loaded in a car in bins. [43]

Q. Was it customary to put several lots into bins when they were sold in bulk?

(Testimony of John M. Bloxom.)

A. Oh, it was done sometimes; sometimes not.

Q. As a matter of fact in this particular instance some of the apples covered by the lot numbers had already been sold and disposed of; you found that out when you come to dispose of these apples, didn't you?

A. I haven't read this record for several years, but I don't remember that.

Q. You don't remember that such a thing happened?

A. No. It may be true, though.

Q. It may be true; in other words, you had a lot of apples of different lot numbers which were almost identical apples; you couldn't tell the difference, could you?

A. Well, I couldn't. I think some of our men could.

Q. Might have been able to tell the difference?

A. Yes.

Q. Well, you had a lot of very similar grades of apples, I mean identical grades of apples, from different growers?

A. Well, apples will vary from the same grower, so the natural practice——

Q. It's hard to tell which would be the better grade from either one or the other, wouldn't it?

A. Well, I could tell that.

Q. When did the corporation get its orders to ship the apples? [44] A day or two or three days or a month before they shipped them, ordinarily?

(Testimony of John M. Bloxom.)

A. During that particular season we didn't accept orders until we got ready to ship.

Q. You didn't accept orders until you got ready to ship?

A. During that particular season.

Q. Was there a ready market for apples at that time? A. Yes.

Q. In other words, it wasn't a question of getting the orders, it was a question of just merely accepting them and shipping, is that right?

A. Generally through that season that was the case.

Q. All of the orders were available?

A. I think that's right.

Q. And of course you knew at the time you executed this so-called sales agreement between the officers on one hand and the officers as stockholders on the other that the apples were sold, all you had to do was accept the orders?

A. That's substantially right.

Q. In other words, the corporation didn't have to go out and sell the apples for anybody; it wasn't to the stockholders' advantage to have the corporation sell them, was it? A. Yes.

Q. It was to the stockholders' advantage to have the corporation sell them, is that right? [45]

A. Yes.

Q. And it was also to the corporation's advantage to distribute them to the stockholders, is that what you intend to convey?

(Testimony of John M. Bloxom.)

A. I don't see any relation between those two questions.

Q. I didn't ask you whether you see any relation; I say, was it to the stockholders' advantage to have the corporation deliver the apples to them?

A. I thought so.

Mr. Velikanje: I don't quite understand that question.

The Court: I'm not clear what it means either. Perhaps if you rephrase it——

Q. (By Mr. Winter): Well, you said, Mr. Bloxom, that it was to the stockholders' advantage to have the corporation sell the apples for them. Now, is that true? A. Yes.

Q. Was it to the advantage of the corporation that they distribute the apples to the stockholders?

Mr. Velikanje: I'm going to object to that, your Honor. Really I don't understand what he's driving at.

The Court: Well, I'll overrule the objection. If the witness can't answer the question he can say so.

A. I'd like to have that last question read again, please.

(Pending question read by the [46] reporter.)

Mr. Velikanje: I think that should be made more definite by referring what he means by "advantage" there. If he means tax advantage, that it was less advantageous to the government, we will admit that.

(Testimony of John M. Bloxom.)

The Court: I don't know just exactly what was intended. Perhaps you can make it more specific.

Mr. Winter: Well, the witness said that this was a good deal for the stockholders. I wanted to find out whether it was a good deal for the corporation, whether he considered it a good deal for the corporation.

Mr. Velikanje: I think that's immaterial, your Honor.

The Court: I'll overrule the objection.

A. It was a good deal for the corporation to have the handling, and sale of those apples, because they made a profit on the washing, storing and handling of the apples.

Q. You say they made a profit on the handling and storing of the apples? A. Yes.

Q. And do you say that they also made a charge for boxing and loading the apples?

A. Yes, they did. It's on your records there.

Q. You just show us where they made a charge or commission for sale of the apples; just show us on the books.

A. You didn't ask that question. They made no charge for [47] selling; they made a charge for washing and storage.

Q. Oh, the actual cost, which they expended and which they took a deduction for on their returns?

A. It wasn't cost; it was cost plus profit.

Q. What profit?

A. There was profit on those charges they made.

The Court: Just a moment here. Maybe I don't

(Testimony of John M. Bloxom.)

understand; these apples had all except the ones in bulk been packed at that time?

A. They were practically all in bulk, your Honor, at the time of this dividend.

The Court: What was the proportion in bulk and in packed boxes, roughly?

A. I would say at least 90 per cent.

The Court: 90 per cent in bulk and about 10 per cent packed?

A. That's very approximate. I haven't seen those figures for several years.

The Court: Well, the ones in bulk, did you pack many of them after that February 28?

A. We washed and sorted them all after that date.

The Court: After that date?

A. After that date.

The Court: They were just put in in bulk, orchard run? [48]

A. That's right.

The Court: When did you pack them?

A. After February 28th; I don't recall the dates.

The Court: All right, proceed.

Q. (By Mr. Winter): Do you ordinarily charge growers a commission for selling the apples?

A. We ordinarily do, but in that year we didn't.

Q. I just asked you whether you ordinarily charged other growers commissions for selling their apples for them. A. Not that year we didn't.

Q. You didn't charge any other growers for——

A. Oh, yes, we charged some.

(Testimony of John M. Bloxom.)

Q. Oh, you charged other growers for commission. Did you charge these stockholders any commission for selling their apples?

A. Our agreement with them was to give them——

Q. I asked you whether you charged these stockholders any commission or not? A. No.

Q. Now as I understand it, these apples were just stored there in bulk? A. Most of them.

Q. When you'd take a lot number in bulk, would you list them on your books in the number of boxes regardless of whether they were stored or not? In other words, if a grower would [49] bring in a carload of apples, would you list them in your records as one load, or one lot, or so many boxes, if they weren't boxed?

A. So many boxes delivered from that grower.

Q. Well, how do you arrive at the number of boxes when they come in in bulk? By weight?

A. They are bulk in boxes. What I mean by bulk apples, at the time they're delivered they're unpacked but they're in boxes.

Q. Oh, they're just put in boxes?

A. And are kept in boxes until they're loaded aboard car.

Q. And then of course they're culled out, and the number of boxes received will not necessarily be the number of boxes shipped, is that right?

A. That's right.

Q. These are just field run apples all boxed up

(Testimony of John M. Bloxom.)

which are kept with no numbers on them except as to lot number?

A. They're kept separate in storage.

Q. You mean in separate rows? A. Yes.

Q. And that has been the practice for years with everyone's apples? A. Yes.

Q. In other words, if I put in 500 boxes there I'm entitled to have my 500 boxes return. All of these apples were purchased [50] by the corporation, they were the property of the corporation?

A. Yes.

Q. And you decided that on February 28 you would, without delivering any of these boxes to the stockholders, that you would enter into this agreement, sell them for them, and just pay them the net receipts, is that right? Was that your intention? A. Whatever the agreement says.

Q. You didn't ever intend to deliver to the stockholders, to their warehouse or any place designated by them, the boxes of apples, did you?

A. That would not be to the advantage of the stockholders.

Q. I say, you didn't ever intend to do that, did you? A. No.

Q. You never intended that they should leave the warehouse, did you?

A. They had to leave the warehouse.

Q. Well, I mean until you as a corporation could take and sell them and collect for them and box them? A. That's right.

Q. The corporation was going to do this, and

(Testimony of John M. Bloxom.)

all the stockholders were to get out of the deal was the net receipts as distinguished from any other year, is that right? A. As I recall. [51]

Q. Yes. Now, with respect to this storage of other produce or other property of the government; that was principally meat under that contract, wasn't it? A. No.

Q. Well, a portion of it was meat?

A. There was considerable meat, yes.

Q. At what temperature do you store meat? Zero?

A. Fresh meat at zero, around zero, yes.

Q. You said that the storage you had on hand, I think you said most of the storage stuff you had on hand was kept at zero for the government?

A. I'm sorry, I didn't.

Q. Well, was it 50 per cent, 75 per cent?

A. No, I'd say probably not over 10 per cent was at zero.

Q. Then you said you had storage at 30 per cent? A. 30 degrees.

Q. 30 degrees, I should say. What do you keep at 30 degrees, apples?

A. Salt meat and lard, which was the bulk.

Q. That was the bulk?

A. I believe lard was the biggest item.

Q. How long ordinarily can you keep lard and salt meat in storage? Five years is not unusual, is it?

A. I don't know; we've never had it over a few months at a time. [52]

(Testimony of John M. Bloxom.)

Q. Over two months? A. A few months.

Q. Matter of fact you know that Armour keeps it for five and seven years?

A. No, I didn't know that.

Q. Even as long as thirty years ago when I was working there we had meat there for five years, salt meat, is that right? A. I wouldn't know that.

Q. Well, it doesn't deteriorate as far as you know, salt meat?

A. It didn't during the few months we had it.

Q. You just kept it a very few months, then, is that right?

A. While the ships were waiting to load.

Q. Was that the practice of the government, just to keep their produce a few months, or their stuff a few months?

A. Most of what they stored out here was waiting for transshipment to Russia, waiting on ships to handle it.

Q. It was anticipated it would be very short storage, is that right?

A. Five to six months, mostly.

Q. Almost less storage than the time for apples, is that right?

A. So far as we were concerned.

Q. Was there considerable eggs stored at that time by the government? [53]

A. I don't know. We didn't store any for the government.

Q. You didn't, as I take it, as a matter of practice, then, the corporation didn't, whether because

(Testimony of John M. Bloxom.)

of the short months or short time the stuff was there, at least the corporation didn't accrue the storage until they shipped it out, is that right?

A. The corporation didn't know that it could accrue.

Q. Well, it didn't do it. You didn't answer my question. Please answer my question. You didn't do it, did you? A. No.

Q. Did you keep the books? A. No.

Q. Did you have anything to do with the accounting?

A. As much as the secretary-treasurer would, yes.

Q. Who did Miss Walker, you say, who did she work under? A. Under Mr. Plath.

Q. He gave her all instructions as to the method of accounting, did he? A. Yes.

Q. Then you didn't have anything to do with the accounting? A. That wouldn't be right.

Q. That wouldn't be right? A. No.

Q. Well, did you have anything to do with it, or did Mr. Plath do it?

A. I had as much as any secretary-treasurer would have, yes. [54]

Q. Well, did you, or didn't you, or did Mr. Plath take charge of the accounting as to the way the books were kept? A. Mr. Plath was manager.

Q. Mr. Plath was manager and Miss Walker was under him; any questions about bookkeeping he discussed with her, did he?

A. She discussed them with me, too.

(Testimony of John M. Bloxom.)

Q. Well, did she ever discuss with you the method of accounting to be used on your income tax returns?

A. She had nothing to do with the income tax returns.

Q. Well, do you know what method of accounting you reported?

A. As far as I know it was the accrual method.

Q. Well, you accrued everything except the amounts due on this storage on these government contracts, didn't you? A. No.

Q. What didn't you accrue?

A. Didn't accrue any storage.

Q. Well, all of your apples were shipped before June 30, you say, the majority of them?

A. No, they were not.

Q. And you charged them so it came in the fiscal year, didn't you?

A. All apples were not shipped by June 30.

Q. You said almost all of them, didn't you?

A. I said most of them.

Q. As a matter of fact I think you said that that is the [55] usual practice in the apple industry, because of the short period of time that they accrue it, they accrue the storage as they're shipped out?

A. Just like we did to government meat; we charged it when it went out.

Q. Well, you accrued and charged all the government meat storage as it was sent out, is that right? A. That's right.

(Testimony of John M. Bloxom.)

Q. Did you claim all the expense in connection with the storage on your return, including the vacation pay? A. I don't remember on that.

Q. You don't remember that?

A. No, I don't.

Q. Do you know of any expense that you didn't accrue? A. I don't remember.

Q. As a matter of fact you accrued all the electricity, costs of running the cold storage plant during all that period of time, didn't you?

A. Oh, yes.

Q. You accrued all of the wages of the employees which weren't paid as of the end of the fiscal year, didn't you?

A. All the wages were paid at the end of the fiscal year.

Q. Well, I say, if there were any wages that were unpaid, if they had accrued they were accrued, weren't they? You accrued them as they became due, didn't you? [56]

A. Paid them as they became due.

Q. Well, you also accrued vacation pay which wasn't due, didn't you? A. Yes.

Q. Yes. A. Vacation pay, that's right.

Q. You charged all of your expense which had accrued or did accrue, you charged those on the books by the end of the fiscal year, didn't you?

A. We intended to, yes.

Q. Yes, you intended to. Do you have your retained copy of your income tax return?

(Testimony of John M. Bloxom.)

Mr. Velikanje: What do you want, the corporate?

Mr. Winter: Yes.

Mr. Velikanje: For what year?

Mr. Winter: The fiscal year ending April 29, 1944.

(Whereupon, corporate income return for year 7/1/43 to 4/29/44 was marked Defendant's Exhibit No. 5 for identification.)

Q. (By Mr. Winter): Your counsel has handed to me what purports to be the retained copy, the corporation's retained copy of their corporation income and declared excess profits tax return for the fiscal year beginning 7/1/43 and ending April 29, 1944, with certain schedules attached. Is that the copy of your return as filed for that year? [57]

A. Yes.

Q. Does the return show the basis of accounting which was employed by the corporation in keeping its books?

Mr. Velikanje: I think it will speak for itself your Honor.

Mr. Winter: We'll offer in evidence the return.

The Court: Any objection?

Mr. Winter: I might say, your Honor, that the reason I don't have the original return, I got a call from Mr. Frank Freeman, Assistant United States Attorney, and I guess your Honor heard that Harvey Erickson broke his leg.

The Court: Yes, the United States Attorney,

(Testimony of John M. Bloxom.)

Mr. Erickson, had an accident and broke his leg, I heard this morning, is the reason he isn't here.

Mr. Winter: Mr. Erickson was going to be here, your Honor, and he had his brief case at home, and Frank called me and said he has three exhibits in his brief case and wanted to know if he should airmail them over; I said no, I think I can get by without them. I can get the original return, but we can substitute a copy for the retained copy.

Mr. Velikanje: I will file no objection to this, however I would like it shown as merely the pencilled copies, so if there was any error made, this is Mr. Boyd's [58] work.

Mr. Winter: I would like to substitute the original.

The Court: Why don't you put the copy in for the purpose of this case, with the understanding that the original may be substituted.

Mr. Winter: That I may substitute a photostatic copy of the original.

The Court: That will be agreeable. It will be admitted with the understanding that a photostatic copy of the original may be substituted.

(Short recess.)

Cross-Examination
(Continued)

By Mr. Winter:

Q. Mr. Bloxom, showing you plaintiff's Exhibit 3, referring to the first sheet there, you'll notice an

(Testimony of John M. Bloxom.)

item there, Mr. Bloxom, "Handling culls," a charge of $89.76. As a matter of fact that is stricken out and not computed in there, and not added in. There's another charge that wasn't charged against the stockholders in that computation, is that right?

A. Yes, according to the agreement it was allowable.

Q. In other words the corporation didn't charge the stockholders, in addition to the commissions, they didn't charge them for handling culls, is that right? A. Yes.

Q. Now, I think you said that the majority of the apples were all delivered prior to June, the end of June, ordinarily, [59] in every year, prior to the end of June of the succeeding year, were either sold or—the majority of them? A. Yes.

Q. Now, just tell us when the corporation marketed these apples here in question in this dividend. Can you refer to the exhibit and tell us when they were marketed?

A. It was prior to June 30.

Q. Yes; as a matter of fact it was begun on March 4, 1944, or about three days after the agreement, and all of the apples, which was all of the apples which the corporation had, as you said a few minutes ago, were marketed by April 20, 1944, isn't that right?

A. I don't know without looking.

Q. Well, look in the exhibit and tell us when the last of them were——

A. There's no dates on here, I don't think.

(Testimony of John M. Bloxom.)

Q. Well, as a matter of fact you recall that it was in April, before the end of April, that all of the apples that the corporation owned in this particular year were marketed, then?

A. No, I don't recall that.

Q. Well, would you say it isn't true?

A. No.

Q. Well, have you any records to show us when the last of these apples were marketed? Is it conceded, counsel, that they were all marketed by April 10, 1944, which was all the [60] apples this corporation owned?

Mr. Velikanje: I'll have to check that, Mr. Winter, before I can concede it.

A. I can clear up that point; there would be no point in holding them beyond April, because if you want to hold apples into June, July and August they'd have to be packed earlier than this in order to keep late.

Mr. Velikanje: Then you'd say they were all sold?

A. I'd say they should have been sold in April.

Q. (By Mr. Winter): Would you accrue all those packing charges for those that had to be sold after April?

A. I believe it was the custom of the company to accrue the packing expenses.

Q. And the only thing you wouldn't accrue would be the accrued storage charges, is that right?

A. My understanding from Mr. Plath was they never accrued storage charges.

(Testimony of John M. Bloxom.)

Q. Until they were shipped? A. Yes.

Q. Well, as a matter of practice and convenience it was easier, because they would all be shipped, practically, before June 30, to accrue them as a matter of bookkeeping when they were shipped, is that right? A. No.

Q. Well, wasn't it much more convenient to do it that way, to [61] accrue them when they were shipped rather than accrue them each month?

A. It was more convenient, yes.

Q. Yes, and that's the reason why it was done, wasn't it? A. No.

Q. Well, you accrued all your wages, you accrued all your packing charges the end of the year, didn't you?

A. We charged the packing; that's only one charge for each grower.

Q. And then it was more convenient to wait and make just one charge for the accrual, is that right, for the storage, I mean?

A. No, there was more than one charge made for storage, as a rule.

Q. Well, your storage was accruing each month, wasn't it? As long as they stayed there you would be accruing storage, is that right? A. No.

Q. Well, if you accrued the storage——

The Court: I think perhaps the word "accrual" may be a little unfair. You mean it accumulated each month?

Mr. Winter: Yes.

(Testimony of John M. Bloxom.)

The Court: Your storage charge is by the month, isn't it?

A. No, your Honor. It was on this government stuff, but not on apples. [62]

The Court: What do you charge for the storage of apples?

A. It accumulates for about two or three months, and after that it stays the same for several months, until May 1, and then it starts by the month again.

The Court: The amount of the charges depends on the length of time the apples are kept in storage?

A. Yes.

Q. (By Mr. Winter): Ordinarily, as in this case, you had shipped all the apples by April 20, 1944; in other words the majority of the apples ordinarily were shipped by that time?

A. The majority of these apples.

Q. Yes. Well, these were all the apples you owned that year, weren't they?

A. I think I testified on that that as I recall these were most of the apples we owned. Of course we had other apples in storage that we were storing and handling besides these.

Q. Do you have a printed or any other document which would show your charges made to customers for storage and packing during that particular year, a schedule?

A. No, we have no schedule; I'd have to go back to the original growers' records. We had various deals with various growers.

(Testimony of John M. Bloxom.)

Q. Would some growers be charged more than other growers? A. Yes. [63]

Q. Would that depend upon the size of the storage commodity, I mean on the——

A. Oh, in a general way, yes.

Q. In other words, you would store a large shipment of apples at a unit price cheaper than you would a small shipment?

A. No, just a larger grower is in a position to bargain for a better deal.

Q. Well, did you consider the stockholders a larger grower or a smaller grower when you were dealing with yourselves?

Mr. Velikanje: Your Honor, I think that's immaterial and argumentative, because they have a written agreement here as to what their action was.

Mr. Winter: Well, I'm just wondering whether they drove a hard bargain or a good bargain, the same as large growers did.

The Court: I'll overrule the objection.

A. The corporation would have been glad to make this same deal with anyone else as they made with the stockholders to handle those apples.

Q. Will you look at Exhibit 3 and tell us how many boxes of the Quandt lot were supposed to have been distributed in kind to the stockholders?

A. May I have the minutes?

Mr. Velikanje: May I have the minutes?

Mr. Winter: Well, I thought he could look that up [64] from the exhibit. I know how many were supposed to be.

(Testimony of John M. Bloxom.)

Mr. Velikanje: Your Honor please, all these exhibits are to be read together. This man has asked to see the minute book to answer this question. I don't see any sense in trying to use these tactics.

Mr. Winter: I just wonder if he can tell us how many of the Quandt lot were supposed to be distributed and how many were actually sold. That's supposed to be a statement.

The Witness: This is how many were sold, but I don't know how many were distributed.

Q. (Mr. Winter): Well, as a matter of fact when you come to distribute and sell the Quandt boxes part of those apples had already been sold to somebody else in that mix-up?

A. I don't know that.

Q. Well, do you recall that there was a mix-up of some of the apples, that the identical lots were not able to be sold because they had already been sold and disposed of?

A. As I recall we found one lot had been partially packed but not sold.

Q. And that was packed by the corporation for its own account, is that right?

A. Had been packed by the corporation for its own account.

Q. And what did you substitute when you made your sale and you packed, for those apples which had been boxed and not sold, [65] from some other lot?

A. I think we substituted the packed apples in-

(Testimony of John M. Bloxom.)

stead of the field run apples. This has been several years since I've seen this.

Q. In any event there was some mix-up in the apples; they weren't distributed in accordance with the exact language of the resolution, is that right?

A. Well, it would appear that way from this; I didn't recall this.

Mr. Winter: That's all.

Redirect Examination

By Mr. Velikanje:

Q. Mr. Bloxom, as a matter of fact it was the Perry lot, was it not, that this mix-up had come in?

A. I think so.

Q. And you state your recollection on that is that these apples had been packed but not shipped?

A. That's my recollection, so we charged packing charges against them and shipped them and sold them.

Q. Now, you asked before to explain this pay of employees as to accrual. What did you want to say on that?

A. Well, it has been customary at the end of our fiscal year, June 30, to give a bonus to our employees. This particular year we closed our fiscal year at the end of ten months and the employees were not entitled to a bonus for another two months, but we accrued ten-twelfths of what we felt they had, [66] and they were paid on June 30.

(Testimony of John M. Bloxom.)

Q. In other words, that was a bonus instead of a vacation pay?

A. I believe it may have been—it—wasn't vacation time yet; we may have accrued ten-twelfths——

Mr. Winter: Well, the return is the best evidence and shows what it is. That's one of the purposes of the return.

The Court: Well, finish your answer.

A. It could very well be, I haven't referred to it for several years, but it could very well be that we accrued ten-twelfths of the vacation pay that was due the employees, but the vacation was not yet due, or the vacation pay was not yet due on that date, but that's the only year we ever accrued that, because that's the only year we ever closed before the end of the fiscal year, that's my point.

Q. Now, in previous years or in some years had the company stored potatoes? A. Yes.

Q. Would those potatoes be in storage some time on July 1? A. Yes.

Q. What did you do about storage on those potatoes?

The Court: I may be mistaken about the testimony, but I thought this witness went into the employ of the corporation in September, 1943. How would he know what [67] was in storage on July 1 of 1943?

A. Told by the manager.

The Court: That's obviously hearsay.

(Testimony of John M. Bloxom.)

Q. All you would know, then, would be what you were told of it? A. By the manager.

Q. Were any potatoes ever stored at Perham Fruit? A. Yes.

Q. While you were there? A. Yes.

Q. What did Perham do as to potatoes that were in storage on July 1, as to storage charge?

A. As I recall, they were not accrued.

Q. Was the crop or the sales year of 1943-44 a different year than other years we've had in the Yakima Valley relating to fruit?

Mr. Winter: With respect to that last question we ask it be stricken. The witness says "As he recalls." We think the books are the best evidence. Our information is that they accrued everything they possibly could, and we'll ask that the answer be stricken as a conclusion of the witness, and not definite at that, and the books are the best evidence. If they're going into these other matters we want the books here.

The Court: What was that question? [68]

(Whereupon, the reporter read the last complete question and answer.)

The Court: As I understand, this is simply to show what the general custom was in the accounting, as to accrual of storage charges?

Mr. Velikanje: That's right.

The Court: I'll overrule the objection, then. We don't want to bring in Perham's books, certainly.

Mr. Velikanje: No, I think they'd object.

(Testimony of John M. Bloxom.)

Q. (By Mr. Velikanje): Mr. Bloxom, was the fruit and sales year of 1943 to 1944 different than any other year, as to the crops and——

A. I believe it was different from any other year I can recall.

Q. For what reason?

A. Well, because of the very light crop and the very heavy demand for apples, and the ceiling price on the apples quoted by the OPA.

Q. Was there trouble in that year of finding enough apples to even get into storage, or fruit to get into storage? A. Yes.

Q. Why were lots marked? I mean for what purpose? That is, I'm referring now to friut that the corporation bought outright; why would those lots be marked so that they could be followed: [69]

A. Well, most of the time we bought them on the basis of the way they would grade out, so we'd have to keep them separate until they were graded out so we'd know how much to pay the growers, but that particular year I believe we bought quite a few apples field run, just all one price, field run, and so in that particular case we'd only have to keep the lots separate so that in case there was some trouble with the customer at destination we could identify the trouble in some particular grower's lot, that hadn't kept or carried as well as some other grower's fruit.

Q. For your own information, to know where those had come from? A. Yes.

(Testimony of John M. Bloxom.)

Q. Why was there no commission charged in the sale of this fruit?

A. Because the corporation's agreement with the stockholders was they would give them as favorable a deal as any other customer of the corporation.

Q. And did you have other agreements that didn't provide for the charging of commission?

A. That particular season we did.

Q. Was that merely to get storage?

A. Yes.

Q. And handling charges?

A. And washing and sorting. [70]

Q. Now, all of the stockholders of the corporation were present at this meeting when this dividend was declared, is that correct? A. Yes.

Q. And that was yourself, Mr. Plath and Mr. Lynch? A. Yes.

Q. Those were the only stockholders of the corporation? A. Wait a minute——

Q. Were they all active in the business?

A. I answered that wrong. We represented all the stockholders, but I believe, my wife is a stockholder and so was Mrs. Plath and her two children at the time.

Q. I don't believe they were at that time.

A. My wife was.

Q. Your wife was, but there was the Bloxom interest, the Lynch interest, and the Plath interest, correct? A. That's right.

(Testimony of John M. Bloxom.)

Q. Were Mr. Lynch, Mr. Plath and yourself all active in the business? A. Yes.

Q. You all took an active part in the business, devoting your full time to the corporation, isn't that correct? A. Substantially.

Q. I'm not saying your exclusive time, but I mean—— A. Substantially full time. [71]

Q. Yes. Now, Mr. Bloxom, had these trustees sold their fruit to an independent broker, we will say the John Doe Fruit Company, would it through normal custom have been the usual procedure to withdraw the fruit from your warehouse?

Mr. Winter: Now, if the Court please we'll object to that as asking the witness—he's not qualified as an expert, he's asking him to assume facts that are not here, they didn't do at all; the sole question in this case is whether or not there was any attempt to distribute and make a valid dividend to the stockholders, or whether or not there was merely an assignment of the income which they were getting on the sale of these apples, for which they already had apples and loads of orders. They didn't need any orders.

Mr. Velikanje: The testimony was there were no orders.

The Court: That goes to the general character of this transaction. I think they would be permitted to show the custom. Overruled.

(Pending question read by the reporter.)

Q. (By Mr. Velikanje, adding): ——for stor-

(Testimony of John M. Bloxom.)

age or handling at a different place? A. No.

Q. What is the normal custom and procedure?

A. The normal custom and procedure is to have it washed and [72] sorted and loaded at the place where it is stored, for the best interests of the fruit.

Q. Now, Mr. Winter asked you if the reason that you didn't accrue storage was due to the fact that it was more convenient not to accrue it, to which you answered no. What was the reason that you didn't accrue storage?

A. I think there's several reasons. First, in the case of many customers they couldn't pay it if you did charge it to them, until the merchandise was sold and the money realized from the sale to pay the storage. Another reason is that there is always the question of liability for the way the fruit kept, fruit and other merchandise kept, and most customers wouldn't pay their storage bill until it's all shipped from storage and they felt that the storage company had the money coming. That's substantially—that is just not the custom of the industry to charge storage until the merchandise was shipped from the plant.

Mr. Velikanje: That's all.

Recross-Examination

By Mr. Winter:

Q. You never collect for storage and packing at any time until it is sold, do you?

(Testimony of John M. Bloxom.)

A. Yes, we've collected for packing.

Q. But it's the usual custom to collect for storage when the fruit is shipped, but we're not talking about collection, Mr. Bloxom, we're talking about whether or not you had earned that [73] storage. Did you earn that storage every month?

A. No.

Q. In other words, if you kept something for a month you hadn't earned any storage, is that your answer?

A. The packing is earned when the fruit is packed, and is payable at that time, and a good share of the time interest is charged on the packing. Storage is not considered due or payable until it's shipped from the plant.

Q. We're not talking about due or payable; we're talking about whether or not it is earned. What do you collect storage for? For keeping merchandise in your warehouse, don't you?

A. Until it's shipped.

Q. I say, for keeping it in your warehouse?

A. Yes.

Q. And the more months it's there the more storage you charged, didn't you?

A. No.

Q. I thought you got through saying that storage is for a certain period of time? A. It is.

Q. And then for several months it doesn't increase, and then it does increase, is that right? In other words, your storage is charged for the length of time it's there, whether it's one year or five? [74]

(Testimony of John M. Bloxom.)

Mr. Velikanje: Mr. Winter, why don't you let him answer one of these questions?

The Court: Well, yes, now you may answer.

Q. Is that right?

A. Storage on fruit increases, the amount of charge increases each month for the first two months. After that it stays the same for probably five—until May 1st.

Q. Well, when you got these apples in there they had earned two months storage after they had been there two months, hadn't they? A. Well——

Q. Didn't you have two months' storage charges due on that? A. No.

Q. You didn't have any two months' storage charge? You were keeping it there free, is that right? A. You said "due."

Q. I say earned.

The Court: I doubt if this cross-examination is too helpful. It's obvious what the situation is.

Mr. Winter: Yes, your Honor.

Q. (By Mr. Winter): Now, Mr. Bloxom, you say in this particular year you bought these apples not on the number of boxes but bought them on the number of boxes which they would grade out, is that right?

A. No, we bought that year a good many apples just as they [75] came from the orchard, so many pounds of apples out of the orchard, so much per pound.

Q. Well, did you buy any of these boxes on the basis of the amount they would grade out?

(Testimony of John M. Bloxom.)

A. I'd have to check each individual lot to answer that.

Q. Well, did you some of these lots?

A. Some of these lots? I don't recall. It's five years.

Q. Well, if you did buy them on that basis you wouldn't know what they cost you until you grade them out, would you?

A. Yes, we very often did at that time and still do very often go in and take a sample grade and settle with the grower at that time.

Q. Well, you know approximately what they'll grade out, but you don't know exactly, do you?

A. We pay them in final settlement on the sample grade, very often.

Q. But other times you insist on waiting until they all grade out before you make your settlement, isn't that right?

A. No, that's not right.

Q. You never do that?

A. We don't insist on it, no. If a grower wants——

Q. Well, does the grower ever insist on it?

A. Occasionally.

Q. Yes, and until it does grade out he doesn't know exactly how much he's going to get, does he? [76]

A. Yes, if he wants to make a sample grade, which most of them——

Q. Well, if he doesn't want to take a sample grade, if he insists on an actual grade, he doesn't

(Testimony of John M. Bloxom.)

know how much he's going to get except approximately, is that right?

A. If he doesn't want to take a sample grade, which most of them prefer.

Q. Because they want their money then?

A. They want their money early.

Q. In other words, they're willing to take a chance then? A. Uh huh.

Mr. Winter: That's all.

Redirect Examination

By Mr. Velikanje:

Q. Mr. Bloxom, on this storage what does the word "in" and "out" mean, in normal storage charges? A. May I see just what you——

The Court: It means the handling of the apples, getting them in and out, doesn't it?

A. The government?

Q. The government or any storage contract, don't you make a charge the first month which includes the handling charge of bringing them in, and also shipping them out again?

Mr. Winter: Are you talking about the handling charge, or storage charge?

Mr. Velikanje: Well, it's in the storage [77] charge.

The Court: The item of in and out is on the——

Mr. Velikanje: ——government contract.

Q. (By Mr. Velikanje): In this government contract, which is Exhibit 4, it states "First month

(Testimony of John M. Bloxom.)

or fraction there" we'll say lard or tallow, .3026, and with asterisks down at the bottom it says "It is understood that all regular charges, including storage, handling in and out, and furnishing performance bond, are made a part of the rate for the first month. The rate for each subsequent month is for storage only." What is this "in and out" cost?

A. That's to cover the charge of receiving it and loading it, which is applicable regardless of the length of time the merchandise is in storage.

Q. So the "in and out" and some of the storage would not be earned until it had moved out, is that correct? A. Yes.

Mr. Velikanje: I believe that's all.

The Court: Mr. Bloxom, do you know whether all these apples that were distributed as dividends had been paid for before the distribution?

A. My impression is they were, your Honor, but I'd have to check the original records to be sure of that.

The Court: They were all Winesaps, weren't they?

A. Yes.

The Court: The Winesap is about the latest keeping [78] variety, isn't it?

A. The Winesaps are the latest in any quantity. There are some Newtons that keep late.

The Court: And Ben Davis, but you don't have any of those?

A. Not here.

(Testimony of John M. Bloxom.)

The Court: The Newton isn't a very popular variety either?

A. Not here.

Recross-Examination

By Mr. Winter:

(Whereupon, computations of vacations payable was marked Defendant's Exhibit No. 6 for identification.)

Q. I'll show you what has been marked for identification Defendant's Exhibit 6, and ask you whether or not you have ever seen that computation before, as secretary-treasurer? Well, to shorten it up, that's a statement or a computation of the vacation pay which is accrued on your income tax return as filed with the government, isn't it, and furnished to the Collector's office?

A. I mentioned the method of figuring it, which has been used here, but whether these are the exact figures I don't know.

Q. As a matter of fact that's a computation of how you computed and accrued the vacation pay, isn't it, that Exhibit 6? [79]

A. That particular year, which is the only time we ever did it, yes.

Q. Well, I say, that is the accrual which you accrued in that particular year?

A. That's the method we used.

Mr. Winter: We'll offer Exhibit 6.

(Testimony of John M. Bloxom.)

The Court: Any objection?

Mr. Velikanje: I have never seen it.

Mr. Winter: It was furnished by Mr. Boyd.

Mr. Velikanje: What is that taken from?

Mr. Winter: Well, it's taken from his books and records; it shows how he computed it on the return.

Mr. Velikanje: I don't find any such page in this tax return.

Mr. Winter: No, it isn't a page; it's reflected in your accruals on the return, and shows the breakdown of it. Is that right?

Mr. Boyd: I don't know offhand; I presume it's right.

Mr. Winter: Well, is it on your typewriter? Did you type it and furnish it to us?

Mr. Boyd: Well, we have twelve typewriters, and I don't know which one it would be.

Mr. Winter: It's your statement; it came from your office. [80]

Mr. Boyd: Well, couldn't this be put in by the party that received it from me, because I don't remember it right at this moment; I presume it's right.

Mr. Winter: Well, I'll call the agent.

The Court: Wait for additional identification, then; if it isn't admitted or if there's objection to it we'll pass it for the time being. Any other questions of this witness?

Mr. Winter: No, I think that's all, your Honor.

The Court: You may be excused, then.

(Whereupon, the witness was excused.)

(Noon recess.)

(All parties present as before, and the trial was resumed.)

C. WALTER OLOFSON

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Velikanje:

Q. What is your name?

A. C. Walter Olofson.

Q. What is your business, Mr. Olofson?

A. I'm a certified public accountant.

Q. With whom are you associated?

A. The firm of Boyd, Olofson and Company.

Q. Where are their offices?

A. 506 Miller Building, in this city. [81]

Q. Mr. Olofson, what was your training, what colleges have you attended, and what schools?

A. Well, I am not a graduate of a resident college; high school education, and correspondence study in accounting.

Q. How long have you had your C. P. A.?

A. Since 1936.

Q. And what have you been doing since 1936?

A. I have been practicing public accounting.

Q. Where? A. In Yakima.

(Testimony of C. Walter Olofson.)

Q. Mr. Olofson, in your work as a public accountant have you done any work for what's known as Produce Row, or the fruit warehouses in the Yakima district?

A. Yes, I have, a considerable amount.

Q. You are familiar with what I refer to as Produce Row? A. Yes.

Q. That is a grouping of the majority of the cold storage and warehouse plants in Yakima, is it not? A. That's right.

Q. Mr. Olofson, at the present time could you estimate what percentage of the warehouses in the Yakima District that your firm represents?

A. You mean the city of Yakima, adjacent to the city?

Q. Well, let's say Produce Row.

A. I haven't counted them up, but I think 75 per cent, perhaps [82] it's 80 per cent.

Q. Did you also represent the Washington Fruit and Produce Company—— A. Yes.

Q. ——as a corporation, and do you now as a partnership? A. That's right.

Q. Where is the Washington Fruit and Produce Company located, and where was it located?

A. On North First Avenue; I don't remember the number, it must be about 401 North First Avenue.

Q. Does North First Avenue have another name?

A. Fruit Row.

Q. Is that the Produce Row that you have referred to, or Fruit Row? A. That's right.

(Testimony of C. Walter Olofson.)

Q. Mr. Olofson, through your past experience are you able to testify as to what the custom is on Produce Row as to the accruing of storage charges or the non-accruing of storage charges, or how it is handled? A. Yes, I think so.

Q. Would you, please?

Mr. Winter: Now, if the Court please—you mean you're asking this witness to testify as to a custom, as to the custom of accruing storage costs on other corporations' books? [83]

Mr. Velikanje: The custom on Produce Row.

Mr. Winter: Well, we object, if the Court please, on the ground that it's irrelevant and immaterial, not within the issues in this case, and has absolutely no probative value on the question involved in this case, and that is whether or not this taxpayer's books of account properly reflected its income from the fiscal year ended April 29, 1944, by reason of the way they handled these accruals on their books. It isn't a question of whether or not somebody else may have—under the law, and the regulations, a taxpayer is required to keep his books and report his accounts; it's mandatory, the statute and the regulations so provide, upon a basis which will properly reflect the income in a taxable year, and every taxable year is a different period, and the fact that someone else might keep them in

(Testimony of C. Walter Olofson.)

a way that might properly reflect it, we have no way of testing the way they kept them, we don't know on what basis they reported, whether they used cash receipts and disbursements, a completed contract, or on an accrual basis, and we object to it.

The Court: I'll overrule the objection.

Q. (Mr. Velikanje): You may proceed, Mr. Olofson.

A. Well, in general the practice of the Row is to set up the storage charges after the commodity has been shipped. [84]

Q. Then it is not the custom to accrue it from month to month? A. No, it is not.

Q. Were you familiar with what the Washington Fruit and Produce Company did in their business prior to their dissolution in 1944?

A. No, I don't think I am.

Mr. Velikanje: That's all, you may inquire.

Cross-Examination

By Mr. Winter:

Q. Did you prepare the return for the corporation for the fiscal year ending April 29, 1944?

A. No.

Q. Did you have anything to do with it?

A. No.

Q. Then you're not familiar with the fact that on April 29, 1944, they accrued all of the storage ac-

(Testimony of C. Walter Olofson.)

counts, for liquidation purposes, including all of the storage accounts which are here in question?

A. Oh, I think I knew that.

Q. Yes, you knew they accrued it all in their return, and it's so shown, for liquidation purposes?

A. I think that's right, I believe I know that.

Q. And those accruals hadn't theretofore been reflected in the books of the corporation except for liquidation purposes, did you know that? [85]

A. I don't know that.

Q. You say you're familiar with about 75 per cent of the corporations on Produce Row, as to the way they handled their books?

A. I said that our clients numbered about 75 per cent.

Q. Have you worked on all of their cases?

A. In greater or less degree.

Q. Isn't it a fact that all of those corporations are on a fiscal year basis, that is, on a fiscal year ended after June 30 of each year?

A. No, I don't think so.

Q. Most of them? A. Yes.

Q. The reason they're on the fiscal year basis is that by June 30 practically all of the apples have been shipped, is that right?

A. It's their natural business cycle.

Q. Yes; there's no apples on hand, to speak of, as of the end of the year, June 30?

A. That's right.

Q. In other words, then, would it make any difference whether they were on an accrual or cash

(Testimony of C. Walter Olofson.)

receipts and disbursements basis so far as that particular year, in accruing for storage charges?

A. For income tax purposes? [86]

Q. For income tax purposes. A. No.

Q. In other words, it is reported as having been received in cash, all of the storage charges, because they have all been earned and collected?

A. Would you repeat?

Q. I'll strike it. Supposing all of the apples had been shipped by June 30, at which time they had made their charges for storage, then you would report all of the storage charges in the fiscal year, and it wouldn't make any difference whether they were reporting on an accrual or a cash basis, would it? A. That's right.

Mr. Winter: That's all.

Mr. Velikanje: That's all.

(Whereupon, the witness was excused.)

The Court: One thing that isn't reflected in the pleadings here that I had wondered about, I don't know whether there's any disagreement regarding it; what happened to the storage facilities of this corporation after April 29? Did they go on and keep this government goods in storage and then the storage charges collected were distributed to the stockholders?

Mr. Velikanje: That's right; I'll bring that out from Mr. Boyd.

The Court: I see, all right. I wondered about that, [87] just what had happened after the liquida-

tion so far as the warehouse operations were concerned.

P. J. LYNCH

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Velikanje:

Q. Your name is P. J. Lynch?

A. Yes.

Q. Mr. Lynch, you were one of the stockholders of the Washington Fruit and Produce Company, a corporation? A. I was, yes.

Q. When did you become such a stockholder?

A. In 1924.

Q. In the year 1944 how many other stockholders were there?

A. I think there were three, as I remember; maybe four.

Q. There was the Plath interests——

A. The Plath interests, and my interests, and——

The Court: Well, I understood, counsel, if I'm wrong I think we can shorten this, I think they were all the plaintiffs in these cases, weren't they?

Mr. Velikanje: No, not at that time, because the children didn't come in until the dissolution, I mean the transfer of the stock.

The Court: Oh, that's right.

Mr. Velikanje: I think it can be stipulated that

(Testimony of P. J. Lynch.)

they were the Plath interests, the Lynch interests, and [88] the Bloxom interests.

Mr. Winter: Yes, they owned all the stock.

Q. (By Mr. Velikanje): Were you present at the trustees' meeting on February 28, 1944?

A. I was.

Q. What transpired at that meeting, just briefly?

A. Well, we set out a certain lot of apples to be used as a dividend in kind.

Q. Mr. Lynch, did you know where those apples were? A. Yes.

Q. Could you go down and physically examine each lot as listed in the minutes?

A. In the minutes of the book?

Q. Yes. A. Now?

Q. No, on February 28; not now. I'm afraid they would be in bad shape by now. On February 28 of 1944. A. Yes, I think I could.

Q. Were you periodically in the cold storage rooms? A. Yes.

Q. Were you familiar with how those apples were kept? A. Yes.

Q. Was each lot distinguishable from another lot by some marking or notation?

A. They had the grower's name on the front of the pile, where [89] they were piled in tiers.

Q. And were they separated so that lots could be distinguished? A. Yes.

Q. Were all of the stockholders, that is, with the exception of Mrs. Bloxom, actively engaged in the operation of the corporation?

A. They were.

(Testimony of P. J. Lynch.)

Q. Did you execute Exhibit 2? A. Yes.

Q. That is your signature? A. Yes.

Q. Did you voluntarily enter into this agreement? A. Yes.

Q. Mr. Lynch, what would have been the procedure had these apples been sold through an independent broker? Now, as procedure, I mean would they have been taken from your warehouse normally, or what would have happened if these apples had been sold through an independent broker?

Mr. Winter: Same objection, your Honor.

The Court: Yes, the record may show an objection by the government counsel. Overruled.

A. Well, it would depend upon what the condition of sale might be. If they could have sold them ahead of time, had them broken out, that would have been one thing, and if they sold them for future loading, why, they would remain just where [90] they were until they were loaded.

Q. But you say if they were broken out; what do you mean by your first statement?

A. Well, in the fall of the year sometimes they sell——

Q. No, I'm figuring as of the 28th of February, not the fall of the year.

A. Well, there's two ways of selling them. You could sell them and have them paid for and leave them sit there in the cold storage with the government certificate to identify the lot, and then you could sell them as they weighed out, each lot would be recognized by a number, if they were packed; if they were loose they'd lose their identity when they

(Testimony of P. J. Lynch.)

went into the car.

Q. What I had reference to, if they were sold to an independent broker would they normally be removed from your warehouse prior to the time of shipping? A. Not as a rule, no.

Q. Mr. Lynch, what was the practice of the Washington Fruit and Produce Company during the years that you were with them as to the handling of storage charges? How were they charged?

A. There was never a charge until the fruit was shipped, or whatever commodity we had in there for storage was removed from the warehouse, and it was charged up.

Q. Did you accrue storage month to month?

A. No. **[91]**

Q. For what reason?

A. Well, there are a number of reasons; because you never know what condition your fruit is in, or whether you have to make an allowance, maybe, for freezing or for excess deterioration on account of temperatures.

Q. Had that happened in years gone by?

A. Oh, yes, I've had that happen several times.

Q. When that happened would you collect your storage?

A. No, we wouldn't collect our storage, no. Matter of fact we've had to pay something in addition besides the storage.

Q. On April 29, 1944, did you have certain government meat and fats and things in storage?

A. We did.

Q. Were those according to the contract that

(Testimony of P. J. Lynch.)

Mr. Bloxom recognized this morning and testified to? A. Yes.

The Court: I haven't examined that contract; how were the charges made in that contract, by the month?

A. Well, I just wouldn't know. The last time I looked at it was about five years ago.

The Court: This contract was on a basis of so much for the first month or fraction thereof, and so much for each subsequent month or fraction thereof.

Mr. Velikanje: That's right.

The Court: So that with that qualification it was [92] on a monthly basis.

Mr. Velikanje: Mr. Winter, I believe it was stipulated or admitted in your answer that the parties reported the dividend in kind on their own income tax return; there's no dispute on that, is there?

Mr. Winter: I don't think that it's material. I think that as a matter of fact they did.

Mr. Velikanje: Well, this is the one for Plath; I'd like to submit that in evidence. Was that a report that you made?

Mr. Winter: I think it may be understood, if the Court please, that all of the stockholders reported on their own individual income tax, consistent with their contention here, reported the dividend in kind, except Mr. Fred B. Plath, and he reported the dividend in kind to the extent only of cost to the corporation, whereas the others took it

(Testimony of P. J. Lynch.)

up as a dividend in kind at the fair market value at the date of the distribution, and some adjustments were made with respect thereto. I don't know if it's material, because it doesn't make any difference how they reported it. It may be understood, if it's material, except we object to it as being irrelevant and immaterial; it's self-serving.

Mr. Velikanje: We would like to offer in evidence the Treasury Department report on the reaudit of Mr. Plath. [93]

Mr. Winter: We object to it on the ground it's purely a revenue agent's report, and there is no evidence that it is a determination by the Commissioner. The Commissioner may or may not have followed it. I don't know that it's material.

Mr. Velikanje: I'll have this identified, your Honor.

Mr. Winter: Well, I'll admit that's the agent's report, and the agent is here.

Mr. Velikanje: I'll call the agent.

Mr. Winter: I'll admit that.

Mr. Velikanje: You may examine.

Cross-Examination

By Mr. Winter:

Q. Mr. Lynch, what were you to get upon the dividend in kind, what were you to receive as a stockholder? A. My share.

Q. What apples were you to receive?

A. What apples?

(Testimony of P. J. Lynch.)

Q. Yes. A. You mean identical apples?

Q. Yes. A. I wouldn't know.

Q. Could you have gone down in the basement and picked out your apples? A. No. [94]

Q. Could any of the stockholders have gone down there and picked out their apples?

A. Oh, I imagine they could have gone out and picked out lots if they wanted to.

Q. You mean they could have picked out all of the lots?

A. I don't know if they could do that.

Q. There was no attempt to segregate your apples from any of the other stockholders', was there? A. No.

Q. And whose idea was it to declare such a distribution?

A. Oh, I think it was a kind of a mutual understanding.

Q. With you, or was it Mr. Boyd?

A. I figured it would be a good thing, yes.

Q. Who told you about it?

A. Oh, I just don't remember; it might have been our bookkeeper or auditor, I don't know, but as soon as it was explained to me I thought it was a good thing for me.

Q. What advantage did you think that you were going to get from handling it that way?

A. Oh, I didn't think I'd go so high in the bracket; I might save a little income tax.

(Testimony of P. J. Lynch.)

Q. Well, then, the sole purpose was to save income tax, wasn't it?

A. Well, I imagine all the deductions are for that same purpose. [95]

Q. Well, was this or was it not for the sole purpose of saving income tax?

A. I don't see what other interest I'd have.

Q. Well, that was the sole purpose, then, is that what you mean? A. I guess so.

Q. Well, then, the corporation could have well sold the apples and distributed the profits to you, couldn't they, as a stockholder?

A. How do you mean?

Q. I mean the corporation could have sold the apples and distributed to you the profits?

A. Without——

Q. Without going through this signing this contract and this procedure you went through?

A. Well, I don't see what you're trying to get at, because——

Q. I didn't ask you to see what I'm trying to get at; just answer my question. Could the corporation have sold them?

A. I told you we went into that in order to save going into the high bracket income; if they sold in the ordinary way we wouldn't have done that.

Q. Well, then, your sole purpose was to save income tax? A. Why, sure.

Q. It was intended by you and the other stockholders that the corporation was going to sell them

(Testimony of P. J. Lynch.)

as usual, doing the packing, [96] doing the storing, and doing the shipping, wasn't it?

Mr. Velikanje: What was that question?

A. I don't understand that.

Q. All right, I'll strike it. It was the understanding between you as a stockholder and you as an officer of the corporation that the corporation was to store the apples, pack the apples, ship the apples, and pay you the profits?

A. Yes, we had a conference——

Mr. Velikanje: Your Honor, I think there's a written contract that is binding.

A. There's a contract on that, isn't there?

Mr. Winter: This is cross-examination.

The Court: Well, I'll overrule the objection. It's shown in the contract, I presume, that they did.

Q. (By Mr. Winter): There was no sales problem; in other words, all the apples were sold that you wanted to deliver, weren't they?

A. Yes.

Q. And you knew that before you entered into this arrangement?

A. Well, I wouldn't say exactly that. I don't think we made all that, I think the arrangements were we set these apples down, and decided afterward, or we may have decided at the time, but the results have shown that we did do it eventually; what time it was decided on that I don't know, just the hour or [97] day.

Q. I think you said that you couldn't tell from

(Testimony of P. J. Lynch.)

month to month as to what storage had accrued, is that right? A. No, I didn't say that.

Q. Well, could you tell from month to month the amount of the accrual of storage on your stuff you had down there?

A. Oh, I suppose if I took the chance to check it up I could have, but I didn't do it.

Q. Well, I think in answer to a question of counsel you said that was one of the reasons why you didn't accrue the storage on these apples, because you couldn't tell how much loss you were going to have.

A. I mean that's why we didn't accrue it each month.

Q. Well, then, on April 29 you couldn't accrue it then, could you?

A. We couldn't accrue it?

Q. Yes, you couldn't determine the accrual?

A. You could determine the accrual, but you couldn't collect it.

Q. You could determine the accrual but you couldn't collect it, is that what you mean?

A. If you had a thousand boxes in storage for five months anybody can tell how much the storage amounted to.

Q. Yes, you bet you, and you could have accrued it on your books that way, couldn't you? [98]

A. If we thought there wouldn't be any loss or kick-back, yes, it would have been all right.

Q. Well, on April 29, 1944, you accrued all the

(Testimony of P. J. Lynch.)

storage that was due on your corporation books, didn't you?

A. I don't know, I didn't take care of the books.

Q. Well, do you know anything about what they accrued on their books, then?

A. No, principally my work was to examine fruit and buy fruit in the field; I didn't have a thing to do with the books; I'm not a book man.

Q. Well, then, you don't know then whether it was proper to accrue it or not, do you?

A. Well, I know we didn't; I don't know whether it was proper or not.

Mr. Velikanje: Mr. Lynch, the corporation never accrued storage, did they?

Mr. Winter: Well, he said he didn't know.

Mr. Velikanje: Isn't that correct, they never did?

A. No, they never accrued month to month.

Redirect Examination

By Mr. Velikanje:

Q. Now, in answer to Mr. Winter's question you said you knew or could figure out what the storage would amount to. Would you know what it amounted to if some of your ammonia pipes broke or some of your fruit spoiled?

A. No; we'd know what the storage amounted to, but we wouldn't [99] know how much we'd have to pay in damages.

(Testimony of P. J. Lynch.)

Q. And if there was a failure you wouldn't collect your storage, would you?

Mr. Winter: We'll object to it as argumentative and suggestive.

The Court: It's repetition, I think.

Q. (By Mr. Velikanje): Mr. Lynch, is it customary on Produce Row and also in the Washington Fruit for various customers to pool their fruit in fruit pools for sale?

A. Sometimes, yes.

Q. Is that quite a common custom?

A. Well, it is more common in other houses than ours.

Mr. Velikanje: That's all.

Mr. Winter: That's all.

Examination

By the Court:

Q. You said, Mr. Lynch, or I understood you to say that the purpose of making this dividend distribution of apples was to save income tax. Did you mean of the stockholders, or the corporation?

A. Of the stockholders.

Q. You thought you would save income tax for the stockholders? A. Yes.

Q. You didn't have a great deal of loss in storage, did you, from damage to fruit? [100]

A. Oh, no. Sometimes we did. It was never very serious; we never had a very serious ammonia leak.

Q. This corporation had been very profitable, had it not? A. Yes.

(Testimony of P. J. Lynch.)

Q. What was the amount of the capital stock of the corporation?

A. Ten thousand dollars.

Q. It paid as much as 500 per cent dividends at times, didn't it? A. I guess it did, yes.

Q. And as late as 1937 you declared a dividend of $62,500 on a $10,000 capitalization?

A. Yes.

Q. That made your excess profits tax very high, did it not? A. Yes.

Q. The trustees knew that, did they not?

A. Yes.

The Court: Any other questions?

(Whereupon, the witness was excused.)

WALTER W. SCHOPPE

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Velikanje:

Q. Your name is Walter Schoppe?

A. That's right.

(Whereupon, Revenue Agent's Report was marked Plaintiff's Exhibit No. [101] 7 for identification.)

Q. Mr. Schoppe, I hand you Plaintiff's identification 7; do you recognize that?

A. It appears to be a revenue agent's report.

(Testimony of Walter W. Schoppe.)

The Court: I didn't get the answer.

A. It appears to be a revenue agent's report.

Q. Out of what district or area?

A. The Seattle Division.

The Court: What number is that?

Q. 7. In 1945 and 1944 you were employed out of that district? A. Right.

Q. What is your business?

A. Internal Revenue Agent.

Q. Mr. Schoppe, would you examine identification 7 further and advise if you had anything to do with the preparation of that instrument?

Mr. Winter: Counsel, I've advised you that that is the report which was furnished to the taxpayer by the revenue agent in charge. We'll admit that it's his report.

Mr. Velikanje: You objected to it going in before, Mr. Winter.

Mr. Winter: Yes, and I still object to it, but I'm not objecting to the proper identity of it. [102]

The Court: You deny the materiality?

Mr. Winter: I deny that it's binding, nor is it a material exhibit, nor is it proper, because there's no showing that the Commissioner followed it.

The Court: All right, there seems to be no doubt about the identification. You're not questioning the identification of this document?

Mr. Winter: Oh, no; just the materiality.

The Court: If you wish to offer it.

Mr. Velikanje: Yes, I'd like to offer this.

(Testimony of Walter W. Schoppe.)

The Court: Then I'll hear you on the admissibility of it. I'm not sure yet I know what it is.

Mr. Velikanje: Well, I think I'd better ask a couple more questions on it.

Q. (By Mr. Velikanje): You audited the books of the Washington Fruit and Produce Company after the corporation's dissolution?

A. I examined the books and records.

Q. And rendered your report then to the Internal Revenue Agent of the Internal Revenue Department?

A. Internal Revenue Agent in charge.

Q. In charge in Seattle? A. Yes.

Q. And this identification 7 is part of your report?

Mr. Winter: Isn't that Mr. Plath individually?

Mr. Velikanje: This is to Mr. Plath individually. [103]

Mr. Winter: That doesn't have anything to do with the corporation.

Q. (By Mr. Velikanje): But as a result of your examination this report was rendered to Mr. Plath?

A. Well, as a result of Mr. Plath's return, probably.

Q. And your examination of the——

A. They were probably made coincidentally or concurrently.

Q. They were made coincidentally?

A. Yes.

Q. Now, Mr. Schoppe, on page 3 under subsec-

(Testimony of Walter W. Schoppe.)

tion B is a reference to dividend in kind. Is that correct? A. Right.

Q. Did you as an agent of the Department recognize this dividend in kind?

Mr. Winter: Just what do you mean; do you mean as to whether or not the corporation recognized it as a dividend in kind?

The Court: He's asking whether he as an agent recognized it.

Mr. Winter: We'll object to it as irrelevant and immaterial, can't be binding on the United States.

The Court: Is it your contention that the government would be bound by the view this agent might take?

Mr. Velikanje: Yes, unless they have come back with any other contention. None has been shown in this [104] case.

The Court: As I understand it, this pertains to the individual return of one of the Plaths, doesn't it?

Mr. Velikanje: That's right, and it's one of the cases we're trying here, but I just desire to show and I have shown from the examination here that he examined the books of the corporation, coincidentally examined the return of Fred B. Plath on the basis of the examination of the return of the corporation, and this is his report as an agent of the United States Government rendered to the Internal Revenue Agent in Charge.

The Court: Was it adopted by the Commissioner, or is there any evidence of that?

(Testimony of Walter W. Schoppe.)

The Witness: The report has been accepted by the Internal Revenue Agent in Charge, and that's usually acceptance.

Mr. Winter: Not the Commissioner, if the Court please.

Mr. Velikanje: Well, I believe this man can testify.

The Court: I probably confused him. What he's talking about is the agent in charge at Tacoma, Washington, Mr. Squire, now, isn't it, and not the Commissioner of Internal Revenue. That's what you meant? A. I believe so.

The Court: Yes; go ahead. [105]

Q. (By Mr. Velikanje): But this has been accepted by the Internal Revenue Agent in Charge?

A. Right.

Q. And do you know of any rejection by the Commissioner of your report?

A. No, I do not—of this report?

Q. Yes. A. No, I do not.

Q. So far as you know it has been accepted?

A. Right.

Mr. Velikanje: Now, your Honor, we offer this in evidence.

Mr. Winter: May I ask you one question?

Voir Dire Examination

By Mr. Winter:

Q. Do you know whether or not the Commissioner has made any additional assessment or au-

(Testimony of Walter W. Schoppe.)

thorized any refund against Mr. Plath for that particular year? In other words, do you know what the status of his income tax is for that year?

A. Presently I believe that report has been accepted; however, because of the dissolution of the corporation there would of course be that difference between the cost of the stock and the fair market value of the assets, which would be taken up as income at the time of dissolution. Now, because of the fact——

Mr. Velikanje: Just a moment. I can't [106] quite figure what you're basing this dissertation on.

A. Well, you asked me whether or not——

Mr. Velikanje: No, I didn't ask you.

A. Excuse me.

The Court: Mr. Winter, I think, asked the question.

Mr. Velikanje: Would you read back Mr. Winter's question?

(Voir dire question by Mr. Winter read by reporter.)

Mr. Velikanje: Now, I think, your Honor, that can——

A. I was trying to explain that answer, and there has to be an explanation.

Mr. Velikanje: I don't think that's responsive; I move it be stricken.

The Court: Yes, it's not responsive. It will be stricken. I think the question is whether you of your own knowledge do or do not know what action

(Testimony of Walter W. Schoppe.)

has been taken by the Commissioner on this report of yours. We're not talking about what somebody told you or what you learned around the office drinking fountain, but do you actually know of your own knowledge what action the Commissioner has taken?

The Witness: Presently of course I think the report has been accepted, but I also say the matter of the income tax on the corporation, which would affect the liability of the individual, I think would keep that return open. [107]

Mr. Velikanje: Well, your Honor——

Mr. Winter: Now he's saying this is still open, that's what he's trying to tell you.

Mr. Velikanje: No, you're trying to tell me that. Mr. Schoppe says he thinks it might be, but he hasn't given any basis of his securing any of this knowledge.

The Court: Isn't there any way this can be definitely ascertained without asking an agent what action the Commissioner has taken in a matter of this kind?

Mr. Velikanje: If there is I don't know.

Mr. Winter: The matter is open unless the Commissioner has issued a letter, and they should have that letter. That's a fact. I'm not trying to limit you. I don't think it makes any material difference whether we've accepted that return. Until this matter is settled we don't know whether that's correct or not. That's what we're here in Court for.

(Testimony of Walter W. Schoppe.)

Mr. Velikanje: No, that's not what we're here in court for.

The Court: I'll admit it in evidence. I can't try the whole lawsuit every time somebody offers an exhibit.

(Whereupon, Plaintiff's Exhibit No. 7 for identification was admitted in evidence.)

Mr. Velikanje: That's all. [108]

Mr. Winter: That's all.

(Whereupon, the witness was excused.)

WINFIELD G. BOYD

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Velikanje:

Q. Your name is Winfield Boyd? A. Yes.

Q. Are you the same Mr. Boyd that Mr. Winter has been referring to as going around adivising all these people how to save taxes? A. I am.

Mr. Winter: Well, I'll give you eight cases he's done this in if you want, counsel.

Q. Mr. Boyd, what is your business?

A. I'm a certified public accountant.

Q. With what office?

A. Boyd-Olofson Company.

Q. How long have you been a certified public accountant? A. Since 1926.

Q. How long have you been in private business?

(Testimony of Winfield G. Boyd.)

A. Since 1937.

Q. What did you do prior to that time?

A. I was a revenue agent.

Q. In what district?

A. In the Seattle Division. [109]

Q. Mr. Boyd, are you familiar with the operations of the Washington Fruit and Produce Company as a corporation?

A. I was familiar with the operations of the Washington Fruit and Produce Company from about 1924 to probably 1937. I should modify that to say that I went back and examined their returns from I guess 1917 on, in the year 1924.

Q. That's while you were——

A. While I was a revenue agent, yes.

Q. While you were with the Revenue Department?

A. Yes. After that I had nothing to do with it until I guess about January 1, 1944.

Q. At the time that you became familiar with them again in 1944 did you go back and check over books and records of the corporation and familiarize yourself with the company?

A. I went back over all the records I could find. I found some of them at the time, and some of them I didn't find until, or didn't get hold of until about a year ago, and there was still another file that I first saw last Saturday, but I tried to familiarize myself with the records.

Q. Are you familiar with the Washington Fruit

(Testimony of Winfield G. Boyd.)

and Produce Company as a corporation, their method of handling storage charges?

A. They handled storage charges the same as most others on the Row, that is, they charged for storage and made the entry when the fruit went out, or probably even when the money came [110] back from the sale of the fruit that went out.

Q. Did they accrue any storage on any of their operations monthly? A. No.

Q. Or over any other definite decided period?

A. Not to my knowledge; I didn't find any such record.

Q. Were you representing the company on their dissolution April 29, 1944?

A. I was representing them as accountant.

Q. Did you prepare their income tax return?

A. For the closing?

Q. Yes. A. Yes.

Q. I hand you Exhibit 7. Do you know the reason that there was an adjusted matter as to the dividend in kind stated in that return? You also prepared Mr. Fred Plath's return, did you not?

A. Yes, I did. The reason for the adjustment was purely and simply——

Mr. Winter: Now, we'll object to it, as the document speaks for itself.

The Court: What's he referring to?

Mr. Winter: He's referring to an agent's report, and he's trying to construe the agent's report as to what it says. That speaks for itself. [111]

(Testimony of Winfield G. Boyd.)

Mr. Velikanje: No, my question was why was it necessary to make a change, I mean why a correction in the return.

Mr. Winter: Are we going to try Mr. Plath's income tax liability for 1944?

Mr. Velikanje: No.

Mr. Winter: We'll object to it as irrelevant and immaterial, as to how he may have reported it.

The Court: What bearing does it have?

Mr. Velikanje: It has no bearing other than this, as an explanation, your Honor; I believe Mr. Boyd's testimony will be that this was an error of his office in using a wrong basis on Mr. Plath's, and is the only one they did make that error in.

Mr. Winter: Even so, what difference does that make?

The Court: I think he should be permitted to make the explanation. The point has been made that in his case he entered only the cost of the apples to the corporation.

Mr. Velikanje: That's right.

The Court: And I got the inference at any rate that that was being relied upon to some extent by the government to show it wasn't a bona fide transaction.

Mr. Winter: No, I'm not relying on that that it [112] wasn't a bona fide transaction, the error that was made here.

The Court: In cross-examination, Mr. Winter, you went into the question and elicited from the witness, I believe it was Mr.——

(Testimony of Winfield G. Boyd.)

Mr. Velikanje: I think it was Mr. Bloxom.

The Court: ——Bloxom, I thought, at any rate, Mr. Winter brought out that in the case of one of these stockholders he didn't even enter the profits on his income tax return, he put it in merely as the basis of the cost to the corporation.

Mr. Winter: No, your Honor, all I said was, counsel asked us to admit that they had all reported the amount of the dividend income on their individual returns, and I said that was absolutely true except Mr. Plath, and he returned it as the cost, and it was later adjusted by the Bureau, and if it was in fact a dividend it would be a proper report, and I said if admissible I would admit those facts, and that's all I've gone into.

The Court: Is it stipulated, then, that all of the stockholders made a return on their individual return showing the profit that was realized from the sale of this fruit except Mr. Plath, and that in Mr. Plath's case it was due to an accounting error of his accountant that it wasn't returned on his return? Is that conceded? [113]

Mr. Velikanje: That's right.

Mr. Winter: I don't concede that it was——

The Court: All right, proceed with the examination. I'll overrule the objection; exception allowed.

The Witness: Well, your Honor, there were three groups of stockholders, and I believe we made the returns for all groups. On Mr. Lynch's return I had the correct amount down and we had the correct amount to report in our office. The techni-

(Testimony of Winfield G. Boyd.)

cality of making out the returns after they brought in the estimates have been rather bad, because people come in and want an estimate made out, and they slam down some figures for the estimate, and then the final return comes up and we may pick the wrong figure, and in the Plath case I picked the wrong figure and the amount was understated on the return, and it was my fault, and the examining agent adjusted it, and we agreed to the adjustment, and so far as I know, and I believe I know correctly, the case was settled.

The Court: Proceed with your examination, Mr. Velikanje.

Q. Mr. Boyd, are you familiar with the customs and practices of Produce Row as to the handling of storage accounts, storage charges? A. Yes.

Q. What is the custom and practice of Produce Row?

The Court: The record may show an objection on [114] this line of testimony, by government counsel, and overruled. Proceed.

A. The custom in the Row is not to take up storage until such time as the merchandise has left the warehouse.

Q. Are you familiar with the reason behind that?

A. The reason behind it is two-fold. In the first place, it would be hard to collect prior to that time, and in the second place the feeling is that the full contract is not consummated until the merchandise

(Testimony of Winfield G. Boyd.)

is delivered in good condition, and if it isn't delivered in good condition it's impossible to collect.

Mr. Velikanje: You may inquire.

Cross-Examination

By Mr. Winter:

Q. Do most of these companies on Produce Row file on a fiscal year basis, Mr. Boyd?

A. They file on various dates. There are a few that file on December 31, some on April 30, some on May 31, some on June 30.

Q. Now, Mr. Boyd, you know as a matter of fact, do you not, as a revenue agent, that most of them have a fiscal year ending after the fruit that has been in storage has left the warehouse, do you not? Now, just state to the Court whether or not that's a fact.

A. The majority of the warehouses have a fiscal year that probably ends so that in the ordinary year the vast majority, or a very considerable majority of the fruit would be out.

Q. Yes, and then it doesn't make any difference whether they [115] were on a cash receipts and disbursements or the accrual so far as the receipts for that particular year is concerned, does it?

A. If all the fruit——

Q. Actually?

A. If the fruit were entirely out it wouldn't make any difference.

Q. And in the cases where a small portion was carried over actually it wouldn't make, tax-wise,

(Testimony of Winfield G. Boyd.)

much difference from year to year as long as there wasn't liquidation, is that right?

A. The smaller the amount of fruit on hand the less the quantity of the error would be.

Q. As a matter of fact, as of June 30, 1944, the practice and the custom and the actual fact in this area, most of the apples if not all have left the warehouses by that time, otherwise they're taken to the dump, isn't that right?

A. June 30, 1944, that might be true, because it was a short crop year.

Q. Well, let's take the average year, wouldn't that be true? A. No.

Q. You mean to tell this Court that not most of the fruit has left the warehouse by June 30 each fiscal year?

A. I was receiver for a company myself that had a lot of fruit on hand on June 30.

Q. Is that the reason why it was in receivership? [116] A. No.

The Court: What varieties are on hand usually on June 30?

A. Usually Winesaps. In the case that I'm speaking of, Judge, it was Delicious, and it had reached the point where it was rather precarious.

The Court: Is there ordinarily a Delicious market in July?

A. I believe that if you had Delicious in good condition that you could sell Delicious apples at any time.

(Testimony of Winfield G. Boyd.)

The Court: Is there any appreciable amount of Delicious on hand in July?

A. Not an appreciable amount of Delicious, your Honor. In the particular case I speak of it was seven cars.

Q. (By Mr. Winter): When does the fresh fruit commence around this area, do you know? Cherries?

A. The fruit would really start coming in about September 10, I would say.

Q. You're talking about apples. I'm talking about small fruit, like cherries and soft fruits.

A. The cherries are considered a crop that may come in June, because the warehouses that handle lots of cherries like to have a May 31 closing.

Q. Now, Mr. Boyd, referring to your exhibit 5, will you just state to the Court what amount you accrued as storage accruals [117] as of April 29, 1944?

A. Your Honor, I didn't accrue anything.

Q. Just answer my question, Mr. Boyd.

(Pending question read by the reporter.)

The Court: If you didn't accrue anything you may say so.

A. I accrued nothing.

Q. For liquidation purposes?

A. For liquidation purposes I placed a value of $37,225.96 on the storage accounts.

Q. Just read that account, the way the account is written there on the books—on the return.

(Testimony of Winfield G. Boyd.)

A. It's headed "Constructive balance sheet showing fair value of assets as of April 29."

Q. 1944? A. Well, it would be 1944.

Q. All right, what does the item which I——

A. And under "Storage accounts" $37,225.96.

Q. All right. What do those storage accounts refer to?

A. Those storage accounts refer to a fair value placed upon the—that could be computed as of April 29 against the merchandise in the house, provided you computed it.

Q. Well, would that be computed upon the storage which had accrued under the contract with the government, and with all the growers? [118]

A. That's computed upon the contracts that you have on the particular merchandise in the house.

Q. Upon the monthly rentals or storage charges, isn't it?

A. Well, it would be computed according to the contract.

Q. Well, is it computed on the monthly storage charges? A. I didn't make the computation.

Q. Well, you know whether it is or is not computed from that. Is it, or is it not?

A. I take it that it is computed by taking the various contracts you had in hand, applying them against the merchandise in the house.

Q. Applying them against what merchandise in the house, the value of the merchandise, or the storage charges?

(Testimony of Winfield G. Boyd.)

A. If you had a hundred tons of lard for a certain length of time, you had a contract on it.

The Court: Is this true, Mr. Boyd; what those figures represent, isn't it, is the amount of storage that would be due the corporation if it were collected on that day, all of it?

A. I think that's correct.

Q. You think? Don't you know?

A. I said I didn't make the computation.

The Court: Well, I was just trying to help out.

A. It is my understanding that this computation was made on the basis as to what they would have collected if on that date [119] all the merchandise had gone out and they had charged it.

Q. Does the return anywhere else, I mean is there taken up in income on the return any portion of those storage charges as reflected in income?

A. No portion of the storage charge was reflected in income.

Q. In other words, no part of the storage income which had been earned prior to that date was taken up as income on the return for 1944?

A. That is correct.

Q. But yet when you liquidate you accrue all of that storage charge for the purpose of liquidation, is that right?

A. The return as filed was filed according to the basis of accounting followed by the corporation. Liquidation comes under another section of law, and we gave what we considered to be the fair value of all assets at that time.

(Testimony of Winfield G. Boyd.)

Mr. Winter: Mr. Reporter, that's not responsive. Please read that question back.

Mr. Velikanje: I think it's responsive.

The Court: Well, I'll determine that. Read the question.

(Last previous question read by the reporter.)

The Court: Can you answer that yes or no?

A. Well, we accrued no storage charge whatever. I answered that in the first place.

The Court: I think there may be some difficulty in [120] the use of terms here. I'm neither an accountant or a tax expert, but I'm trying to find out what you're talking about here.

A. Your Honor, I could explain it.

The Court: Proceed.

Q. (By Mr. Winter): Well, on April 29, 1944, how much was due the corporation for storage for merchandise in that plant up to that date? Can you tell us, as an accountant?

The Court: Well, I think that will probably get the same response we had before when you used the word "due." They take the position it isn't due.

Q. Let's use the word earned.

A. If your fruit went out, if the merchandise in the house went out on April 29 and you collected under the scheduled prices, there would have been thirty seven thousand some odd dollars come in at that time.

Q. Was any part of that thirty seven thousand,

(Testimony of Winfield G. Boyd.)

is any part of that thirty seven thousand dollars reflected in the income tax return as profit or loss?

A. No part of that thirty seven thousand was in in the income tax return for that year.

Q. Has any part of that thirty seven thousand been reported in the individual income tax returns as income? A. Yes.

Q. As distinguished from capital gain? As ordinary income? [121] You understand what I mean, Mr. Boyd?

A. The thirty seven thousand dollars, by virtue of being included as an asset on the liquidation date, comes across to the individuals as capital gain.

Q. Yes. Was any part of it reported as ordinary income earned by the corporation or by the individuals? That's what I want to know.

A. Well, it wasn't reported by the corporation, and it was reported as capital gain by the individuals.

Q. Well, then, the answer is no, then, isn't it? Is that what you mean? Is the answer to my question "no"?

A. I believe the answer to your question would be no.

Q. Yes. That's all. Wait a minute. All the expenses in connection with the storage, running the plant, and everything, were taken as an expense on the return, up to date, weren't they?

A. All expenses of labor, and power, depreciation——

Q. Including vacation pay that accrued?

(Testimony of Winfield G. Boyd.)

A. ——and vacation pay that accrued would be in as expense.

Q. I'll show you what has been marked for identification defendant's Exhibit 6. Do you recognize that as a statement coming from your office that you submitted in connection with the investigation of the corporation's tax liability for that year?

A. Frankly I don't recognize this as coming from our office. [122]

Q. Well, look at the return.

A. Undoubtedly this was worked up, and probably is from our office.

Q. Well, I'll ask you whether or not the return shows an accrual and takes a deduction for the accrual of pay in accordance with that schedule? I realize your name is not signed to it, Mr. Boyd. I haven't seen the books, so I didn't make it.

A. Well, it would have to be included under accrued expenses, I imagine it was, and frankly——

Q. Under included expenses of how much?

A. ——and frankly I think this was in as expense.

Q. Well, did you accrue that amount in the return as an expense, pay earned but not paid, vacation pay?

A. It would have to appear as accrued expense.

Q. Under what schedule?

A. In the balance sheet.

Q. Under the balance sheet. Just read the item where it would be included.

(Testimony of Winfield G. Boyd.)

A. There is no such figure here; I think it's in an amount of $6,768.80.

Q. What is the heading?

A. This figure is $1,192.60. I think it belongs in there, but I can't make the definite statement at this time.

Q. Is Mr. Olofson here? Well, as a matter of fact you know [123] as a matter of fact that they did accrue vacation pay, and it's reflected in the return, and took a deduction for it?

A. I think they accrued vacation pay.

Q. And what other accruals did they accrue with respect to bonuses, as shown by the return? Would you read that to the Court? You're reading from the return, now, Exhibit 5.

A. We have an item of deferred profits and accrued expenses, and on 6/30/43 that amount was $5,891.06, and on 4/29/44 it was $6,768.80, and that is about all this——

Q. Well, just read that note that's there on your return, Mr. Boyd.

A. Well, find me the note. O. K.

Q. Under explanation of items of income and expense. A. All right.

Q. On your income tax return, Exhibit 5. Will you read to the Court what you say there?

A. Under "compensation of officers" I make this statement: "Above includes 15 per cent bonus accrued and applied for to Salary Stabilization Unit, bonus to be paid only after permission is secured."

(Testimony of Winfield G. Boyd.)

Q. At that time you didn't even have permission to accrue it, but you accrued it, didn't you?

A. That was an item you couldn't pay until you got permission.

Q. Well, as I say, you did accrue it, although you didn't [124] have permission, you couldn't pay it, didn't you? A. It must have been accrued.

Q. Well, you kept your books on the accrual basis of accounting, didn't you, Mr. Boyd, and so reported in your income tax return?

A. No, I think the books were kept——

Q. What—all right.

A. ——on the basis of accruing certain items; other items were handled on the deferred charge basis.

Q. Deferred charge, or do you call it more or less of a completed contract basis?

A. Well, the ranch operation, for instance, was handled in an entirely different way.

Q. Well, that was a separate operation?

A. Well, it was part of the Washington Fruit and Produce Company operation.

Q. Just refer to the return and tell us what that says in answer to the question upon what basis was the corporation's return made.

A. Item 10 of the questions states this: "Is this return made on the basis of cash receipts and disbursements?" Answer "No." "If not, describe fully in separate statement." "Taxes and similar expenses have been accrued as in past."

Q. "As in past"? A. "As in past." [125]

(Testimony of Winfield G. Boyd.)

Mr. Winter: I think that's all. We'll offer in evidence the statement, unless counsel has some objection to it, Exhibit 6.

Mr. Velikanje: I don't believe that's been properly identified, your Honor.

Mr. Winter: Well, I just wanted to relieve you from bringing in the books and records here. We can take it out from the books and records that was furnished from your office. I can put a witness on to have him testify. I don't know why you're so afraid of it if it's not true.

The Court: I'll sustain the objection as not properly identified at this time. The witness said, as I recall, that he couldn't positively identify it. Any other questions?

Redirect Examination

By Mr. Velikanje:

Q. Mr. Boyd, I believe you testified to that, how was the ranch handled for accounting purposes?

A. The books of the ranch would be closed at the end of the calendar year, that is, on December 31; they would make up the profit and loss of the ranch, and then all expenditures of the ranch from that time on would be capitalized, that is, labor, spray, fertilizer, pruning, and all; well, they would carry on then until that year's crop was taken off.

Q. Then that would not be reported in the tax year ending June 30? [126]

A. On June 30 every year there was an account in the books called "deferred ranch expense" and

(Testimony of Winfield G. Boyd.)

that would run up to about $4,000.00. It was treated as an asset, but they didn't inventory any growing crop, they didn't try to estimate the value of the crop, they just let it ride as a deferred charge. In other words, it was handled differently than the straight accruals, and it's just a different method of accounting for that particular branch of the business.

Q. You started to state before Mr. Winter interrupted you as to the two different methods necessary, one to accounting of the corporation, the other as to accounting in liquidation. Could you explain that at this time?

A. Well, I think that explanation is the whole basis of this case. As we understand it, any going corporation in its year of liquidation files its return on the same basis that it would file if it were continuing in business, that is, you don't revalue any assets, you don't——

Mr. Winter: Oh, if the Court please, this is merely argumentative and giving his own conclusion on the matter. We'll object to the answer as not proper redirect examination.

Mr. Velikanje: I think, your Honor, he can testify as an expert.

The Court: Well, he's an expert accountant. I'll overrule the objection. [127]

A. So that on a going concern you would close the books just as though you were following your old system. Now, the section of law relating to

(Testimony of Winfield G. Boyd.)

liquidations, it is mandatory to show the fair value that the stockholders get in liquidation. They may have a building that's worth three times what the books show; you have to value that, and we did value those buildings; we charged the value of the buildings, the equipment, the ranch, and we also charged in these accounts, that is, we valued accounts at that time because we had to, and the reason for putting the accounts in on the liquidation was that we had to show them at that time, because it was mandatory that we come in with a fair valuation.

The Court: Well, regardless of any requirement of law it's a matter of accounting, if you were making an assets and liabilities statement of a corporation you'd have to put in earned storage charges, wouldn't you, Mr. Boyd? If you represented a client who wanted to borrow from a bank would you leave out $37,000 of earned storage charges as part of the assets, when you were making up the statement to the bank as to its worth?

A. There would be two ways of handling it; you could put in the constructive balance sheet, which we did here.

The Court: You're getting a little deep for me; what is a constructive balance sheet?

A. A constructive balance sheet is a balance sheet that is [128] not necessarily for the books.

The Court: I'm very ignorant on accounting, but if a corporation wanted to borrow from a bank

(Testimony of Winfield G. Boyd.)

they'd have to make a statement showing their assets and liabilities, wouldn't they?

A. And ordinarily you'd make a constructive balance sheet.

The Court: You didn't answer my question. Wouldn't they ordinarily make out a statement of assets and liabilities?

A. A statement of assets and liabilities would be a constructive balance sheet.

The Court: You mean to say that wouldn't reflect $37,000 of earned storage charges?

A. It would, and I have shown it in this one referred to here. It is shown, and it does show the storage.

The Court: I don't want to take too much part in the examination here. It just occurred to me, though, that it wasn't altogether on account of a legal requirement you'd make up this kind of a statement. Whatever you call it, if you wished to reflect the assets and liabilities of this corporation correctly on April 29 you'd have to show their earned storage charges?

A. That is correct, and you do it by a constructive balance sheet.

The Court: I'm not concerned with how you show it; [129] go ahead with your examination.

Mr. Velikanje: That's all.

Mr. Winter: That's all.

(Whereupon, the witness was excused.)

Mr. Velikanje: We rest.

(Short recess.)

Mr. Velikanje: I was wondering if I might reopen to make one statement. I wonder if it is clear to you, I have attempted to bring it out, that this government storage moved in and out, this was not one bulk storage that stayed a long period of time, but Mr. Bloxom testified this morning it would come in and stay for just a few months, and move out again, and that they made their charges as it moved out. I wanted to be sure that was clear.

The Court: I'm not sure whether the record shows that or not. I think he did testify it was of short duration, usually wasn't in more than two or three months, and I don't recall clearly the moving in and out part of it. You may recall him if you wish.

JOHN M. BLOXOM

a witness for the plaintiff, was recalled and testified further as follows:

Direct Examination

By Mr. Velikanje:

Q. Mr. Bloxom, how long would this government storage be in your warehouse? [130]

A. Anywhere from one month to six months. It was customarily coming in and going out throughout the war.

Q. And what was your practice as it moved out?

A. To charge storage to the government after

(Testimony of John M. Bloxom.)

each car had been shipped, but charge them nothing before each car had been shipped.

Q. In other words, as storage would move out piecemeal, you would charge the storage on that that moved out?

A. On each car. We were charging storage to the government right up to the time we disincorporated, every day.

Mr. Velikanje: That's all.

Cross-Examination

By Mr. Winter:

Q. After you disincorporated did you continue to store for the government there? A. Yes.

Q. Did you get a new contract with the government? A. I don't recall.

Mr. Velikanje: We have it here if you desire it.

A. But I do remember that our storage deal with the government all during the war was on the same terms.

Q. When you cancelled that contract as of April 29, or when you liquidated, did you accrue as income any part of the storage that had been earned prior to that time from the government and not charged?

A. We accrued everything that was earned. We felt we hadn't [131] earned it until after each car was shipped.

Q. Then if you had a dozen cars there on April 29, 1944, when you liquidated, and they hadn't come

(Testimony of John M. Bloxom.)

out, you didn't report that as income for the year 1944, is that right?

A. We felt we had not earned it.

Q. Although the merchandise had been there under your agreement for four months, you didn't include that on your returns?

A. No, I think that was testified to before.

The Court: The witness nodded his head. You have to answer by voice.

A. Sorry. Everything we loaded out on April 29, we charged storage on.

The Court: I think that's clear.

Mr. Winter: I think it's clear now.

Mr. Velikanje: That's all, Mr. Bloxom.

(Whereupon, the witness was excused.)

Mr. Velikanje: Do you wish to see this other instrument?

The Court: I might say in my interrogation of Mr. Boyd here I wasn't taking any position in this matter at all; I was trying to bring out that as I get it, it's the contention of the taxpayer here that there was one basis of computation or consideration of these storage charges for the purpose of a liquidation statement of assets and liabilities, and another for the purpose of income tax [132] return. That is your position, isn't it?

Mr. Boyd: Yes, sir.

The Court: I think Mr. Velikanje should answer as to the position. I don't know whether you heard me or not.

Mr. Velikanje: No, not necessarily.

The Court: Well, all right.

Mr. Velikanje: We rest, your Honor.

WALTER W. SCHOPPE

recalled as a witness on behalf of the defendant, resumed the stand and testified as follows:

Direct Examination

By Mr. Winter:

Q. Your name is Walter W. Schoppe?

A. Walter W. Schoppe.

Q. And you were a witness who was called to testify for the plaintiffs in this action this morning?

A. Right.

Q. As I understand, you were a revenue agent assigned to investigate the tax liability of the plaintiff corporation for the taxable year ended April 29, 1944?

A. For the taxable period ended 4/29/44, right.

Q. In connection with that investigation did you have occasion to check the accruals as appearing on the books of the corporation? A. I did.

Q. And I show you what has been marked for identification defendant's Exhibit 6. I'll ask you to state if you know what [133] that is and where it came from?

A. It is the computation, it's titled "Computations of vacations payable, Washington Fruit and Storage Company" and I believe I received it from Mr. Boyd's office, and it shows ten-twelfths of a

(Testimony of Walter W. Schoppe.)

year of vacations payable, in the total sum of $993.83.

The Court: That's enough; it's identified.

Q. How did you come to request or get that exhibit?

A. There was an accrual account on the liability side of the ledger, and in checking out that account I found the vacations payable, and I questioned the item originally, and then this exhibit——

Q. Who did you take the matter up with, the taxpayer's accountant, Mr. Boyd?

A. Mr. Boyd was representing the taxpayer before the Treasury, or before the Bureau of Internal Revenue at that time.

Q. And in connection with that he furnished you that statement, is that right?

A. Yes, and he told me that this was the way it was computed.

Q. I'll ask you, Mr. Schoppe, in your examination of the books and records, whether or not all accounts of the corporation were either accrued, or how they were handled on the books?

A. Well, insofar as I know all the accounts, all the payables, [134] were accrued, but the income was not accrued. All the storage accounts were not accrued, insofar as I know.

Q. Was all other expenses on the corporation without exception accrued?

A. Of course I would be just limited to the books, and if they had anything otherwise I wouldn't know, but I presume that they accrued everything.

(Testimony of Walter W. Schoppe.)

Mr. Wniter: That's all. We'll offer in evidence defendant's Exhibit 6.

Mr. Velikanje: You got that from Mr. Boyd's office? A. I believe so, yes.

Mr. Velikanje: With that testimony I have no objection to it, your Honor.

The Court: It will be admitted.

(Whereupon, Defendant's Exhibit No. 6 for identification was admitted in evidence.)

Cross-Examination

By Mr. Velikanje:

Q. Mr. Schoppe, did you also in your examination make an examination of the dividend in kind?

A. Originally I found the dividend in kind on the books and I believe I passed it, I mean I accepted it; I made no adjustment on it, and then subsequently I was asked to re-examine the dividend in kind as to the facts and so on and so forth, and then I found that—well, that answers the question.

Q. Did you render a report to the corporation or a copy of [135] your report go to the corporation as your findings on the dividend in kind?

A. I presume the revenue agent's report was rendered to the corporation by the Internal Revenue Agent in Charge.

Q. And that would be your report to him, would it not, based on your findings?

A. Well, I passed on my copy of the report.

Q. Is that what you have in your hand?

(Testimony of Walter W. Schoppe.)

A. No, I have a photostatic copy of the typed report made by the Internal Revenue Agent in Charge of September 24, 1945.

Q. Mr. Schoppe, you found from an examination of the corporation's books it had been their custom all the way through not to accure storage, isn't that correct?

A. I don't believe I went back over any previous years. For the year under examination I didn't find that they accured storage charges.

Q. Particularly referring at the time of the dissolution of the corporation, about all they had in storage was this government merchandise, isn't that correct?

A. Well, I didn't go into what they had in storage. I believe Mr. Boyd told me that or mentioned something to that effect.

Q. In other words, you didn't bother to go in and see what they had in storage? A. No.

Mr. Winter: Well, he didn't make this investigation until two years later; he wouldn't know.

Q. Did you look over the contracts on storage of anything?

A. I don't recall at this time. As a matter of fact, I don't recall seeing that contract before.

Q. You didn't ask for it or anything?

A. No, I don't believe so.

Mr. Velikanje: I believe that's all.

(Testimony of Walter W. Schoppe.)

Redirect Examination

By Mr. Winter:

Q. Just one further question: I'll ask you whether or not you've had a good deal of experience examining returns of produce storing houses, have you?

A. Yes, I have had considerable experience.

Q. As a rule do the majority file on a fiscal year or a calendar year basis?

A. Well, they usually file on the fiscal year, because that's the natural time for closing; they have no inventories, or inventories are very low, so they usually file on May 31, or most of them June 30, I believe.

Q. They would at that time, as I understand it, have very little or no inventory on hand?

A. Practically none. What they would have would be worthless or practically worthless.

Mr. Winter: That's all. [137]

Recross-Examination

By Mr. Velikanje:

Q. Mr. Schoppe, in your examination of these other companies didn't you also find that it was not the practice to accrue storage until the merchandise was shipped out?

A. I don't think I ever made a particular finding with reference to that.

Q. Well, do you remember it?

(Testimony of Walter W. Schoppe.)

A. I don't think the matter has ever come up. I don't know.

Q. So far as the Washington Fruit and Produce Company, they didn't make any accrual as to their crops they were growing on any ranches they owned, did they?

A. No, not that I know of.

Q. You testified before that all other items were accrued by them?

A. I believe I had reference to expenses. I think that was the question.

Q. Well, storage is not an expense, is it?

A. I think the question that was asked me, whether or not all expenses were accrued.

Q. All right, were there any other items that you found in your examination of the Washington Fruit and Produce Company that were not accrued?

A. Since I am more or less confined to the books and records when I make an examination, would you ask the question with reference to specific items? [138]

Q. Well, you answered it when Mr. Winter asked you. You state now that you were referring only to expenses?

A. I think that was Mr. Winter's question. He asked me whether or not the Washington Fruit and Produce Company accrued all its expenses.

Mr. Velikanje: Could you find that question back there?

(Whereupon, the reporter read the question and answer referred to, as follows: "Question:

(Testimony of Walter W. Schoppe.)

Was all other expenses on the corporation without exception accrued? Answer: Of course I would be just limited to the books, and if they had anything otherwise I wouldn't know, but I presume that they accepted everything.")

Q. (By Mr. Velikanje): Now, you say the ranch operations were not accrued?

A. Frankly I don't remember anything about the ranch operations. This was five years ago.

Mr. Winter: The ranch is not in issue here.

Q. The ranch was a part of the corporation, wasn't it? Didn't the corporation own some ranches?

A. That I couldn't say definitely at this time unless I made a re-examination.

Q. Mr. Schoppe, as a matter of fact as to this dividend in kind, had this dividend been allowed or had no dividend been [139] made, and carried over——

Mr. Winter: If the Court please, we'll object to it as not proper cross-examination. I didn't go into anything on dividend in kind, as I recall, with this witness. I didn't intend to open up——

The Court: Well, let counsel finish his question and we'll see what he meant to ask him.

Q. (By Mr. Velikanje): From your examination of the books of the corporation is it not a fact that had the corporation failed to declare a dividend in kind or a dividend, whatever we would call it, and allowed this to proceed to the dissolution, that

(Testimony of Walter W. Schoppe.)

taxwise it would have been more advantageous to do that because of the capital gains feature?

Mr. Winter: We object to it as irrelevant, immaterial, not proper cross-examination, calling for a conclusion of this witness.

The Court: Well, I'll overrule the objection. You may answer it.

A. Well, the question was rather involved. You began with "Is it not." Will you read the question, please?

(Pending question read by the reporter.)

A. Taxwise I think it would have been to the disadvantage of the corporation because of the excess profits tax involved.

Q. But you have already come in and charged them with the full amount of their tax by the method used by the agent's [140] office, isn't that correct?

A. Yes, they received the actual money.

Q. Then on liquidation they would have treated this distribution as a capital gain and only been charged on 50 per cent of it, isn't that correct?

A. That is right.

Q. With a 25 per cent maximum.

The Court: I don't know that I follow you. Are you assuming that the apples would have been on hand on April 29?

Mr. Velikanje: Irrespective of whether the apples were on hand or whether they had been sold by the corporation, if they had not declared a dividend.

The Court: I see, what you mean, the apples or

(Testimony of Walter W. Schoppe.)

the returns from them would have been on hand.

Q. And it would have been treated then as a capital gain to the individuals, based on 50 per cent taxwise, with a maximum of 25 per cent, is that not correct?

A. Well, now, first—may I have the question again, since there was an interruption? It's a complicated question. I'm sorry.

Q. Let me re-state it. If they had not declared a dividend, that is, the corporation, and had allowed either the apples or the return from the apples to remain in the corporation—— A. Yes. [141]

Q. ——then at the time of distribution or liquidation on April 29, 1944, the amount of gain to the individuals would have been based as a capital gain, and treated by taxing 50 per cent of the gain with a maximum of 25 per cent, is that not correct?

A. I think you're stating some facts and not asking a question.

Q. I was giving——

Mr. Winter: I don't understand the question, if the Court please, and will object to it as irrelevant, immaterial, argumentative, and assuming facts that are not here.

The Court: Well, I'm not sure I understand it either. Read the question again. If the witness can't answer he can say so, if he isn't able to for any reason.

A. Well, I'd like to answer if I understand it.

The Court: That's what I mean. If you don't

(Testimony of Walter W. Schoppe.)

understand it or you feel you shouldn't undertake it, just say so.

Q. (By Mr. Velikanje): Mr. Schoppe, assuming a state of facts that the Washington Fruit and Produce Company did not in February of 1944 declare a dividend——

Mr. Winter: Either in kind or in money.

Q. ——either in kind or in money, assuming those facts, and they had allowed this money to remain in the corporation's hands up to the time of dissolution, would not then any gain [142] to the taxpayers over their initial cost of their stock be treated as a capital gain?

A. It would be true that it would be treated as a capital gain; however, 85.5 per cent is lost by the excess profits tax imposed thereon, so if this refers to your prior question whether it was to the advantage of the taxpayers to take the dividend in kind or not, I believe it would have been to their disadvantage taxwise to let the corporation earn the income and then take the 50 per cent on dissolution.

Q. But Mr. Schoppe, by the government's action in this case they have charged back all the profits to the corporation, have they not, so that they are already taxed, under the government's theory of this case, with the excess profits tax?

Mr. Winter: Now, if the Court please, counsel's question assumes a contention that is not made by the government in this case. Our contention is that this was income of the corporation, and we tax the income to the person who earned it, who had a right

(Testimony of Walter W. Schoppe.)

to receive it, and that's our position in this case; he assumes a fact when he states our position otherwise.

Mr. Velikanje: But your assumption is it is taxable to the corporation.

Mr. Winter: That the corporation had the income. It was an anticipatory assignment of the income to the stockholders, if you will read our contention. If you [143] want to recite the contention to the witness then we have no objection, but we object to your reciting our contention otherwise than we make it in this case.

The Court: Well, I'm not sure that I understand; the income that you seek to assign now to the corporation is the profit that would have been made on this fruit if it had been held throughout by the corporation?

Mr. Winter: If the corporation had sold it between March 14 and April 20, the same as they did sell it.

The Court: You're not contending, of course, that the whole sale, or the returns for the sale of the fruit, would be income to the corporation?

Mr. Winter: No, the corporation had the cost, the sales expense, and the profit, that was income to them and could have been distributed in dividends to the stockholders instead of passing on or assigning the anticipatory income.

The Court: Well, weren't some of the expenses charged to the stockholders in connection with this fruit?

(Testimony of Walter W. Schoppe.)

Mr. Winter: Yes, there were some expenses that were charged to them, but all of the profit was passed on to the stockholders.

The Court: I get your contention, I think, now.

(Whereupon, the pending question read by the reporter.)

A. Presently. [144]

Q. You mean presently under the government's theory?

A. Presently as the facts stand.

Q. They have been charged with the excess profits tax?

A. Yes, and they have paid the tax.

Q. And they have paid the tax.

A. And now they are asking for the refund, for the recovery.

Q. That's right, but you said in your previous answer that taxwise, because of this excess profits tax, it was more advantageous to pay a dividend?

A. I believe so.

Q. That is, if it was a dividend in kind?

A. Yes.

Q. But even if it had been held and not paid even as a dividend in kind, in distribution it would have come within the rules of capital gains as a long term capital gain, isn't that correct?

A. Yes, what was left of it, which would be 14.5 per cent.

Q. And instead of going to the individuals and taxed by them at their full amount of the dividend, the dividend plus the profits that they made from

(Testimony of Walter W. Schoppe.)

the sale of the dividend in kind? A. Right.

Mr. Velikanje: I believe that's all.

Mr. Winter: That's all.

(Whereupon, the witness was excused.)

Mr. Winter: The government rests, your Honor. [145]

The Court: Do you have any other testimony?

Mr. Velikanje: No rebuttal.

The Court: These cases have not been consolidated for trial, and I wonder if there shouldn't be a stipulation of record here that the evidence in the case now on trial, P. J. Lynch against the United States, No. 386, that that evidence is to be taken by the court as the evidence in the other cases which I shall enumerate here, and that the decision in the Lynch case is to govern the decision in the other cases also, and the others I have reference to are 387, Bloxom, 388, Plath, 389, Plath, 390, Plath, 391, Plath, 392, Bloxom; I have named there all except 331, M. Gail Plath as executrix, which I understand is the gift case.

Mr. Velikanje: That's right.

The Court: May the record so show?

Mr. Winter: All those cases your Honor read are consolidated for trial, and the evidence shall apply to all.

Mr. Velikanje: That's right.

(Time fixed for filing briefs, and this trial was adjourned.) [146]

Reporter's Certificate

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, do hereby certify: That I am the regularly appointed, qualified and acting official court reporter of the United States District Court in and for the Eastern District of Washington. That as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Honorable Sam M. Driver, Judge of the United States District Court for the Eastern District of Washington, held on March 20, 1950, at Yakima, Washington.

That the above and foregoing contains a full, true and correct transcript of the proceedings had therein.

Dated this 22nd day of November, 1950.

/s/ STANLEY D. TAYLOR,
Official Court Reporter. [147]

[Title of District Court and Cause.]

CERTIFICATE OF THE CLERK

I, A. A. LaFramboise, Clerk of the United States District Court for the Easterm District of Washington, do hereby certify that the documents annexed hereto are the Original, except as noted—

Complaint.

Summons & Return of Service on Defendant.

Stipulation Continuing Time to File Answer.

Answer.

Order for Pre-Trial Conference.

Order Continuing Pre-Trial Conference.

Record of Proceedings at the Trial.

Findings of Fact and Conclusions of Law.

Letter Dated July 26, 1950, from Judge Driver to Counsel Advising of the Court's Decision, copy which I certify to be a true and correct copy of the original.

Judgment.

Exhibits (Nos. 1-a to 7, inclusive).

Notice of Appeal.

Statement of Points on Appeal.

Affidavit of Service by Mail of Notice and Statement on Appeal.

Notice of Cross-Appeal.

Statement of Points on Cross-Appeal.

Affidavit of Service by Mail of Notice and Statement on Cross-Appeal.

Designation of Record on Appeal.

Designation of Record on Cross-Appeal.

on file in the above-entitled cause, and that the same constitutes the record for hearing of the Appeal

from the Judgment of the District Court in [168] the United States Court of Appeals for the Ninth Circuit as called for by the Appellant and the Cross-Appellant in their designations of record on Appeal, except Item No. 3 in Appellant's Designation of Record, which document does not exist.

I further certify that the above-enumerated documents constitute the complete file in the above-titled cause.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Yakima in said District this 19th day of January, 1951.

[Seal] A. A. LaFRAMBOISE,
Clerk,

By /s/ THOMAS GRANGER,
Deputy Clerk.

[Endorsed]: No. 12814. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. P. J. Lynch, Appellee. P. J. Lynch, Appellant, vs. United States of America, Appellee. Transcript of Record.

Appeals from the United States District Court for the Eastern District of Washington, Southern Division.

Filed January 22, 1951.

PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
Ninth Circuit

No. 12814

UNITED STATES OF AMERICA,
Appellant,

vs.

P. J. LYNCH,
Appellee and Cross-Appellant.

STIPULATION

It Is Hereby Stipulated by and between Velikanje & Velikanje and John S. Moore, Jr., attorneys for the appellee and cross-appellant, and Harvey Erickson, United States Attorney for the Eastern District of Washington, attorney for the appellant, that he complete transcript of record and the transcript of testimony and exhibits in the case of P. J. Lynch vs. United States of America, Civil No. 386, Eastern District of Washington, be printed and that the record in the following cases shall not be designated for printing:

Marian L. Bloxom vs. USA.....No. 387
Dolores Plath vs. USA.....No. 388
M. Gail Plath vs. USA.....No. 389
M. Gail Plath, Exec. vs. USA.....No. 390
Fred M. Plath vs. USA.....No. 391
John M. Bloxom vs. USA.....No. 392

Dated this 26th day of January, 1951.

/s/ VELIKANJE & VELIKANJE,

/s/ E. F. VELIKANJE,

/s/ S. P. VELIKANJE,

/s/ JOHN S. MOORE, JR.,
Attorneys for Appellee and
Cross-Appellant.

/s/ HARVEY ERICKSON,
Attorney for Appellant.

[Endorsed]: Filed February 6, 1951.

No. 12,814

IN THE

United States
Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellant
v.
P. J. LYNCH, Appellee

P. J. LYNCH, Appellant
v.
UNITED STATES OF AMERICA, Appellee

On Appeals from the United States District Court for the Eastern District of Washington

---

BRIEF FOR THE UNITED STATES

THERON LAMAR CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,
ROBERT N. ANDERSON,
HOWARD P. LOCKE,
Special Assistants to the Attorney General

HARVEY ERICKSON,
United States Attorney.

FRANK R. FREEMAN,
Assistant United States Attorney.

EVERGREEN PRESS, SPOKANE

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No. 12,814

IN THE

United States
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UNITED STATES OF AMERICA, Appellant

v.

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P. J. LYNCH, Appellant

v.

UNITED STATES OF AMERICA, Appellee

On Appeals from the United States District Court for the Eastern District of Washington

---

BRIEF FOR THE UNITED STATES

OPINION BELOW

There is no opinion in this case but the views of the District Court which heard and decided the cases consolidated in these appeals, are included in a letter dated July 26, 1950. (R. 16-17.)

JURISDICTION

These appeals involve, in the consolidated cases, excess profits taxes in the amount of $34,670.12, declared value excess profits taxes in the amount of $5,637.48, and interest thereon, for the year 1944. (R. 13.) These taxes were assessed against the Washington Fruit & Produce Company which was volun-

tarily liquidated on April 29, 1944, and subsequent thereto the taxes were assessed against P. J. Lynch, and six other persons (R. 148), as transferees of that corporation (R. 12). Payment of the taxes so assessed was made by the transferees on the basis of stock ownership. (R. 12.) The record does not disclose the date on which the claims for refund were filed but they were denied on February 3, 1949 (R. 6), and the suit for refund in the case of P. J. Lynch was filed on April 15, 1949 (R. 3-6), in conformance with Section 3772 of the Internal Revenue Code. The District Court took jurisdiction of the case under 28 U.S.C., Section 1346. Judgment was entered October 30, 1950. (R. 18-19.) Notice of appeal was filed by the United States on December 27, 1950 (R. 19), and by P. J. Lynch on December 28, 1950 (R. 22), pursuant to 28 U.S.C., Section 1291, upon which the jurisdiction of this Court is based.

QUESTION PRESENTED

The appeal of the United States presents the question of whether or not the net proceeds from the sale of a spceified number of boxes of apples, alleged to have been distributed to the stockholders as a dividend in kind, are taxable to the Washington Fruit & Produce Company.

STATUTE INVOLVED

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gain, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses,

commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * * (26 U.S.C. 1946 ed., Sec. 22.)

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

(a) *Definition of Dividend.*—The term "dividend" when used in this chapter * * * means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the taxable year * * *.

* * * * *

(26 U.S.C. 1946 ed., Sec. 115.)

STATEMENT

This case comes to this Court on cross appeals from a judgment partly in favor of the taxpayer and partly in favor of the United States in a suit brought by the taxpayer to recover his proportionate part of taxes paid as transferee of the Washington Fruit & Produce Company. It was stipulated at the trial of the P. J. Lynch case, No. 386, in the District Court that the evidence taken in that case was to be taken by the court as the evidence in the cases of Marian L. Bloxom, No. 387; Dolores Plath, No. 388; M. Gail Plath, No. 389; M. Gail Plath, Executrix, No. 390; Fred M. Plath, No. 391; and John M. Bloxom, No. 392, against the United States and that the decision in the P. J. Lynch case was to govern the decision in the other cases and all of the cases were consolidated for trial. (R. 144.) In this Court it is stipulated that the

complete transcript of record, including the testimony and exhibits, in the case of *P. J. Lynch v. United States* only need be printed and that the record in the other cases on appeal need not be printed. (R. 148.)

By agreement between the parties this brief will be limited to the issue presented by the appeal of the United States. The facts relating to that issue, as found by the court below and as adduced in evidence, may be summarized as follows:

The Washington Fruit & Produce Company, a corporation, was engaged in the growing, handling, warehousing and marketing of fresh fruits and vegetables. (R. 12.) The taxpayer in this case, and at least four of the other persons concerned with this appeal, were stockholders of that corporation. (R. 74.) The corporation was liquidated on April 29, 1944. (R. 12.)

At a meeting of the stockholders of the corporation held on February 28, 1944, the corporation declared a dividend in kind of a certain lot, 21,977 boxes (R. 12, 47), of apples (R. 29, 91). This so-called dividend in kind was declared for the purpose of obtaining an income tax advantage to the stockholders (R. 97, 101) but it also worked a tax advantage to the corporation (R. 102, 139, 141) and the court below held that to be the primary motive for the declaration of the dividend. (R. 17).

At that same meeting each of the stockholders entered into a contract (R. 33, Ex. 2) with the corporation to dispose of that lot of apples (R. 32, 92) for the then stockholders and account to them on the sale (R. 37, 57, 95). The contract also provided that the corporation was to deduct costs of washing, packing and storing the apples out of the proceeds of their sales. (R. 53.) It was understood at the meeting that if the so-called dividend in kind were declared the stockholders would enter into the contracts for the

sale of the apples by the corporation (R. 49, 98) and the contract was carried out to the letter (R. 33).

On March 4, 1944, the sale of the apples under the contract was begun and they (i.e., 21,977 boxes) were all marketed by the end of April. (R. 47, 64-65.) None of the apples were ever delivered to any of the stockholders and there was no intention to do so (R. 56) because at that time the corporation had sufficient orders on hand so that the sale was accomplished merely by accepting orders (R. 51, 81, 98). This was because of the O.P.A. ceiling and the heavy demands for apples. (R. 73.) The corporation's bookkeeper rendered a statement of receipts and charges made against the stockholders as a settlement sheet of the transaction (R. 35, Ex. 3) and the stockholders were paid the net proceeds (R. 37, 98).

The Commissioner of Internal Revenue ruled that the dividend in kind of the apples by the corporation was not a valid dividend to the stockholders but an attempt by the corporation at the assignment of income which it anticipated would be derived from the sale of the apples; that the sale of the apples by the corporation was a sale on its own account; and that the excess of the sale price over the cost to the corporation was income to it. (R. 12, 13, 16.) The court below held, however, that the declaration of the dividend was a genuine rather than sham transaction and that the fact that it was motivated by a desire to reduce taxes would not render it invalid. (R. 16-17.) The United States has appealed to this Court for a review of that decision and holding. (R. 19-21.)

STATEMENT OF POINTS TO BE URGED

The statement of points relied upon by the United States appears in the record at pages 20-21. It may

be summarized as follows: That the court below erred (1) in concluding that the dividend in kind was a genuine transaction; that the sale of the dividend apples was not made by the corporation and that the proceeds in excess of the corporation's basis did not represent taxable income to it and its finding and conclusion to the contrary is without support in the evidence; and (2) in failing to find that the declaration of the dividend in kind costituted an anticipatory assignment of income by the corporation, so that the assessment of taxes against the stockholders, as transferees of the corporation, was proper and lawful.

SUMMARY OF ARGUMENT

The evidence in this case leaves no doubt that the sale of the dividend apples was intended to be and actually was made by the corporation. That evidence refutes the conclusion of the District Court that the declaraion of the dividend in kind was a genuine transaction. That erroneous conclusion led the District Court into ignoring the now well established rule that the proceeds of the sale of property involved in a dividend in kind is taxed to the declaring corporation where it, before or after the distribution of the property to the stockholders, has arranged for the sale of the property even though the proceeds go to the stockholders. That rule is clearly distinguishable from that which taxes the proceeds of the sale of property involved in a dividend in kind to the stockholders when they have, on their own responsibility, negotiated the sale of the property on their own behalf.

Here the District Court was led away from the applicable rule by the assumption that the declaration, which it held genuine, isolated the corporation from

gain in the sale of the apples. But that assumption ignored the actualities of the whole transaction. The dividend was declared solely for tax avoidance purposes and the District Court so found. Notwithstanding that fact the District Court held for the taxpayer despite authority to the effect that in such an instance a dividend in kind is not a distribution contemplated by the statute. Its validity was nullified by that rule. In substance the whole transaction was a sham for the passage of title in an attempt to defeat taxes upon the corporation.

But regardless of that effect of the dividend, it represented but an anticipatory assignment of income because the corporation had but to accept orders already on hand to derive income from the apples on hand. The dividend and contract of February 28, 1944, was made only because that was a fact. Under well fixed rules of law an anticipatory assignment of income will not relieve the assignor of taxation upon that income when realized and however realized.

ARGUMENT

The Commissioner of Internal Revenue correctly determined that the net proceeds or profit from the sale of the apples was taxable to the corporation.

It is important at the outset to point out that the sale of the dividend apples was intended to be made and was made by the corporation and not in any sense by the stockholders. The corporation's secretary-treasurer testified that at the February 28, 1944, meeting, at which the so-called dividend was declared, the contract for the sale of the apples by the corporation was discussed (R. 49) and signed (R. 32, 92), and that the stockholders then knew that all the corporation had to do was accept orders which were then on

hand for the apples (R. 51). There was a ready market at that time (R. 51), because of a light crop and the ceiling fixed by O.P.A. (R. 73), and it was to the stockholders' advantage to have the corporation sell them (R. 51). That testimony was substantially corroborated by another stockholder (R. 98) who was present at the meeting (R. 91). The apples were never delivered to the stockholders, nor was it intended that they should be (R. 56), but the corporation sometime between March 3, 1944, and the end of the following month (R. 64-65) sold the apples allegedly for the stockholders' account and turned over the net proceeds to them (R. 37, 98).

These facts alone show the error of the District Court in its conclusion that the declaration of the dividend was a genuine transaction and that there had been no prior orders for the apples and no prior sale or arrangements for sale. (R. 17.) There may have been no prior orders for the *specific* lot of apples included in the declared dividend in kind and no specific arrangement for the sale of those apples. Manifestly, there was no prior sale of those apples, otherwise they could not have been included in the dividend lot. There was, however, evidence elicited in the cross-examination of witnesses, that all the corporation had to do was accept orders (R. 51, 98) which were merely awaiting acceptance. That situation is borne out by the fact that the sale of the dividend lot of 21,977 boxes of apples was begun on March 3, 1944, only three days after the dividend was declared, and was completed in April (R. 64-65) with, presumably, the sale of most of them in March. These facts not only rebut, as being without support on the record, the finding and conclusion of the District Court but establish a contrary conclusion which should unavoidably have compelled the consecutive conclusion

that the dividend was not a genuine transaction and that if the conveyance of title to the apples in the sales were made through the stockholders they were a mere conduit. We here make no contention that the declaration of the dividend in kind, in and of itself, resulted in gain to the corporation because the value of the apples had appreciated in its hands. *General Utilities Co. v. Helvering,* 296 U. S. 200; *Commissioner v. Columbia Pacific S. Co.,* 77 F. 2d 759 (C.A. 9th); *Rudco Oil & Gas Co. v. United States,* 82 F. Supp. 746 (C. Cls.). The only question here is whether the corporation realized taxable income from the sale of the apples following the declaration of the dividend.

A. *The incidence of taxation must be determined by the substance of a transaction, as a whole, rather than by its form.*

The rule applicable to this case is that the proceeds of the sale of property involved in a dividend in kind is taxed to the declaring corporation where it, before or after distribution of the property to the stockholders, has arranged for the sale of the property even though the proceeds go to the stockholders. *Commissioner v. Court Holding Co.,* 324 U.S. 331; *Wichita Term. El. Co v. Commissioner,* 162 F. 2d 513 (C. A. 10th); *Fairfield S. S. Corp. v. Commissioner,* 157 F. 2d 321 (C.A. 2d), certiorari denied, 329 U.S. 774; *Hellebush v. Commissioner,* 65 F. 2nd 902 (C.A. 6th). In the *Court Holding Co.* case, *supra,* the corporation, after negotiating for the sale of its property, declined to go through with the sale because it would result in a large tax upon it, and the following day it declared a "liquidating dividend" of the property to its stockholders and deeded it to them. They in turn effectuated the contract made with the pur-

chasers by conveying the property to them. In that case the Supreme Court said (p. 334):

> The incidence of taxation depends upon the substance of a transaction. The tax consequences which arise from gains from a sale of property are not finally to be determined solely by the means employed to transfer legal title. Rather, the transaction must be viewed as a whole, and each step, from the commencement of negotiations to the consummation of the sale, is relevant. A sale by one person cannot be transformed for tax purposes into a sale by another by using the latter as a conduit through which to pass title.

In the *Wichita Term. El. Co.* case, *supra*, the corporation was held to be taxable on the gain on the sale of property where its president, who, with his family, owned a large part of the stock of the corporation, negotiated the sale and consummated it after the property was conveyed to him as "agent for the former stockholders", dissolution of the corporation having taken place in advance of the conveyance. It was held that the president had negotiated the sale for the corporation. In that case, decided after the *Court Holding Co.* case, *supra*, the court said (p. 515):

> The transaction as a whole was cast in the form of conveyances of the properties of the corporation to Powell, as a liquidating dividend, dissolution of the corporation, and conveyances of the properties to the ultimate purchaser. The formal documents were molded in that pattern. The naked legal title passed from the corporation to Powell, and from Powell to the ultimate purchaser. And Powell was designated or referred to as agent for the former stockholders of the corporation. But in a case of this kind involving questions of liability for income taxes, the form of the transaction is not necessarily conclusive. The formal written documents are not always in-

> flexibly binding. *Helvering v. F. R. Lazarus & Co.,* 308 U.S. 252, 60 S. Ct. 209, 84 L. Ed. 226. Income taxes cannot be avoided by methods, devices, anticipatory arrangements, or contracts which merely give illfounded complexion to the reality of a transaction in its relation to tax liability. *Lucas v. Earl,* 281 U.S. 111, 50 S. Ct. 241, 74 L. Ed. 731; *Griffiths v. Helvering, Commissioner,* 308 U.S. 355, 60 S. Ct. 277, 84 L. Ed. 319.

In the *Hellebush* case, *supra,* decided several years prior to the *Court Holding Co.* case, *supra,* where the property of the corporation was conveyed to the purchasers by trustees for the stockholders, after negotiations for its sale by one of its officers and decision of the stockholders to dissolve and liquidate the corporation, the gain on the sale was taxed to the corporation. In so holding the court said (pp. 903-904):

> We think it is clear that there was no distribution in kind, in the sense of a division, of the assets * * *. Neither was there any distribution in kind to the stockholders "upon dissolution" * * *. We think that this was a sale by one company to the other upon the profits of which the government was entitled to its taxes.

Compare also *Commissioner v. First State Bank,* 168 F. 2d 1004 (C.A. 5th), certiorari denied, 335 U.S. 867.

The rule of the foregoing cases is plainly distinguishable from that which holds that where a corporation declares and pays a dividend in kind and the stockholders upon their own responsibility negotiate a sale of the property in their own behalf, no gain results to the corporation. *United States v. Cumberland Pub. Serv. Co.,* 338 U.S. 451; *United States v. Cummins Distilleries Corp.,* 166 F. 2d 17 (C.A. 6th); *Howell Turpentine Co. v. Commissioner,* 162 F. 2nd 319 (C.A. 5th). It is, however, noteworthy that the Supreme Court in the *Cumberland Pub. Serv. Co.* case

supra, in which it distinguished the *Court Holding Co.* case on the ground we here point out, said the language in the *Court Holding Co.* case, which we have quoted above (pp. 454-455)—

> * * * does not mean that a corporation can be taxed even when the sale has been made by its stockholders following a genuine liquidation and dissolution. While the distinction between sales by a corporation as compared with distribution in kind followed by shareholder sales may be particularly shadowy and artificial when the corporation is closely held, Congress has chosen to recognize such a distinction for tax purposes. *The corporate tax is thus aimed primarily at the profits of a going concern.* (Italics supplied.)

In this connection it is pertinent to point out that the alleged dividend of February 28, 1944, in the instant case was not a liquidating dividend. What has happened is that the corporation took its stock in trade and allegedly distributed it to its stockholders as a dividend and thereafter continued to operate its business until April 29, 1944. (R. 11, 12.) The "going concern" referred to in the *Cumberland Pub. Serv. Co.* case, *supra,* at the profits of which corporate taxes are aimed is thus present here.

Under the facts adduced in evidence in this case, which we have heretofore discussed, it is clear we submit that the proceeds from the sale of the apples were taxable to the Washington Fruit & Produce Company and that the District Court was in error in not so deciding. We submit that in not so deciding the District Court considered that the dividend in kind was declared in advance of the arrangement for the sale of the apples and was, therefore, genuine, and insulated the corporation from the gain in the sale. That view of the situation ignores the actualities of

the whole transaction. The contract for the sale of the apples was made at the same meeting at which the dividend was declared; it was known at that time that the apples were or could be sold merely by accepting orders which were already on hand; and the testimony was unequivocal that the dividend was declared only for the purpose of accomplishing a tax advantage to the stockholders and to the corporation. The District Court found this as a fact. (R. 17.) The declaration of the dividend thus served no purpose except to avoid taxes. It was thus devoid of reality, was a sham, and should not be recognized for tax purposes. It is not apparent how the District Court could find that as a fact and yet ignore the rule of the *Court Holding Co.* case, *supra*. In that light it seems clear that the dividend fails to meet the definition set out in Section 115(a) of the Internal Revenue Code, *supra*.

That section defines a dividend as a distribution made by a corporation out of profits to its shareholders, whether in money or in other property. However, not every formal distribution made to stockholders by a corporation out of profits is a "distribution" within the meaning of Section 115(a). Under the doctrine of *Gregory v. Helvering,* 293 U.S. 465, the words must be taken to refer to transactions entered into for commercial or industrial purposes, and not to include transactions entered into solely for tax avoidace motives such as the evidence shows, and the District Court found, was the fact in this case. Here, thus, the distribution was utterly devoid of business purpose. In a similar and analogous situation the Court of Appeals for the Second Circuit in *Commissioner v. Transport Trad. & Term. Corp.,* 176 F. 2d 570, certiorari denied, 338 U.S. 955, rehearing denied, 339 U.S. 916, said (p. 572):

> * * * the declaration of the dividend * * * was not the kind of "distribution" which § 115(a) presupposes. It was not a distribution for the purposes of the Parent's business but only in order to escape a tax and such a "distribution" is not among those contemplated in the section. * * * Since the proceeds of the sale were in any event to reach the same treasury, it was altogether irrelevant that the title to the shares passed from the Parent and not from the taxpayer. The doctrine of *Gregory v. Helvering, supra*, which we here hold to be controlling, is not limited to cases of corporate reorganizations. It has a much wider scope; it means that in construing words of a tax statute which describe commercial or industrial transactions we are to undertand them to refer to transactions entered upon for commercial or industrial purposes and not to include transactions entered upon for no other motive but to escape taxation.

The Court of Appeals in that case reversed the decision of the Tax Court and held that there was no "dividend" within the meaning of Section 115(a) and that in consequence the corporation was taxable on gains resulting from the sale of the property notwithstanding the fact that legal title to the property had been conveyed to its sole stockholder and the latter in turn completed the formalities of the sale and received the proceeds directly from the purchaser. On the same basis the decision of the District Court in the instant case should, we submit, be reversed by this Court since it demonstrates the error of the District Court's conclusion that the sole desire to reduce taxes would not render the transaction invalid. (R. 17.)

Similarly in *Commissioner v. First State Bank,* 168 F. 2d 1004 (C.A. 5th), certiorari denied, 335 U.S. 867, the corporation declared a dividend in kind of notes

it had previously charged off as worthless. The notes were not distributed to the stockholders but were turned over to the vice-president of the bank who made the collections and distributed the proceeds to the stockholders. The Tax Court held that by reason of the declaration of the dividend in kind, the collections on the notes did not represent taxable income to the corporation. The Court of Appeals for the Fifth Circuit, however, viewed the situation oppositely, reversed the Tax Court and held that the income was taxable to the corporation. In that case the Court of Appeals said (p. 1011):

> * * * there was in reality nothing divided as a dividend to the stockholders till the money was paid them, and in reality the bank made the recoveries * * *.

We believe this same observation is germane to the instant case. The dividend apples were not delivered to the stockholders nor segregated from other apples owned by the corporation and the corporation accepted the orders for the apples which it already had on hand and marketed them as though it had full title. The facts in this case bring them within the rule of the *First State Bank* case, *supra*, and distinguishes it from *General Utilities Co. v. Helvering*, 296 U.S. 200, since in that case the property was physically transferred to the stockholders.

We believe that despite the form in which it was cast, the substance of the transaction, viewed as a whole, was merely a sale of the apples by the corporation and the subsequent distribution of the net proceeds to the stockholders. The authorities we have cited and rely upon uniformly hold that tax consequences cannot be avoided by transforming a sale by one person into a sale by another by using the latter

as a conduit for the passage of title. The present case is even stronger in support of that position than is the usual case in which the principle is invoked because in this case the sales were actually made and consummated by the corporation without any intention to, or the actual, transfer of the physical possession or inteerst in the property to the stockholders.

B. *The transaction represented an anticipatory assignment of income.*

Irrespective of whether the declaration of the dividend in kind was devoid of reality and a sham, the rule is now well established that where a dividend in kind represents an assigment of future income, that income is taxable to the corporation when collected by the stockholders. *Commissioner v. First State Bank, supra; Commissioner v. First State Bank of Matador,* 172 F. 2d 224 (C.A. 5th); and *Rudco Oil & Gas Co. v. United States,* 82 Supp. 746 (C.Cls.) Those decisions proceed on the doctrine of *Lucas v. Earl,* 281 U.S. 111; *Helvering v. Horst,* 311 U.S. 112, and *Harrison v. Schaffner,* 312 U. S. 579, that an anticipatory assignment of income will not serve to relieve the assignor of that income.

The rule of those cases finds appropriate application in this case. The apples in the corporation's hands without regard to the dividend in kind were more than merely potential income because, as we have pointed out, the corporation had but to accept already existent orders for them at the price fixed by O.P.A. prior to the declaration of the dividend. In fact the dividend and the contract of February 28, 1944, would not, apparently, have been made had that not been true. The income from the sale was, therefore, definitely realizable and known whether or not the corporation had actually committed itself to sell

the apples at the time the divided was declared. Thus clearly the declaration of a dividend consisting of apples was in fact and in effect an anticipatory assignment of the proceeds from the sale of apples. In this posture the instant case appears to be on all fours with and not distinguishable from *Commissioner v. First State Bank, supra,* and the significance of the court's statement in *Commissioner v. Transport Trad. & Term. Corp., supra,* quoted above is even more apparent.

CONCLUSION

The decision of the District Court should be reversed.

Respectfully submitted,

THERON LAMAR CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,
ROBERT N. ANDERSON,
HOWARD P. LOCKE,
Special Assistants to the Attorney General

HARVEY ERICKSON,
United States Attorney.

FRANK R. FREEMAN,
Assistant United States Attorney.

April, 1951.

APPENDIX

Supplement to the printed record:

Among the documents filed in this Court was the Designation of the portion of the Record to be printed. That designation specified that the entire record designated as the record on appeal was to be printed and that that designation itself was to be printed. Included in the designated record on appeal was the minutes of the meeting of February 28, 1944, Exhibit 1a (R. 30), and the contract of that date between the stockholders and the corporation, Exhibit 2 (R. 33). Both of these exhibits and the Designation of the portion of the record to be printed were omitted in the printed record and to correct that error they are herein included as a supplement to the printed record. They are as follows:

IN THE UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellant, v. P. J. LYNCH, Appellee and Cross-Appellant	No.---------- DESIGNATION OF THE PORTIONS OF RECORD TO BE PRINTED

Comes now the appellant and designates the following portions of the record to be printed in conformity with the rules of this court:

1. The entire record designated as the record on appeal pursuant to Rule 75(a) of Civil Procedure

2. Appellant's Statement of Points pursuant to Rule 19(6) of the Ninth Circuit
3. Appellant's Designation of Contents of Record to be printed.

DATED this 9th day of January, 1951.

HARVEY ERICKSON,
United States Attorney
FRANK R. FREEMAN,
Assistant United States Attorney
Attorneys for Appellant.

Exhibit 1a

WASHINGTON FRUIT & PRODUCE COMPANY

Minutes of Meeting of Trustees of
WASHINGTON FRUIT & PRODUCE COMPANY

A meeting of the Trustees of the Washington Fruit & Produce Company was held February 28, 1944, at ten o'clock A.M. in the offices of the Company.

This meeting was called by the president for the purpose of electing a secretary and treasurer, and for the purpose of considering the declaring and payment of a dividend.

At this meeting all of the Trustees, who owned all the stock of the Company, were present, Trustees and Stockholders being named as follows:

Fred B. Plath
P. J. Lynch
John M. Bloxom

Mr. Lynch moved that Mr. John M. Bloxom be elected secretary and treasurer of the Company. This motion was seconded by Mr. Plath and carried.

It was moved by Mr. Plath and seconded by Mr. Lynch, and carried, that Mr. Bloxom be authorized to sign the Company's checks.

Mr. Plath then moved that the Company declare a dividend of 21,977 boxes of field run Winesaps, for which the Company has paid $29,116.84, consisting of the following lots on hand at this time:

Lot	Plath	Lynch	Bloxom	Total
Ashman	348	150	102	600
A. Brown	1980	852	580	3412
Foster Ranch	2376	1025	696	4097
Perry	604	260	177	1041

Quandt	3181	1372	933	5486
Tyrrell	1574	678	461	2713
Zirkle	1065	459	312	1836
Howe	496	214	145	855
Parker	1123	484	330	1937
	12747	5494	3736	21977

This amount shall be credited to the Stockholders in ratio to their stock holdings, namely: 12,747 boxes to F. B. Plath, 5494 boxes to P. J. Lynch and 3736 boxes to John M. Bloxom. The motion was seconded by Mr. Bloxom and carried.

Mr. Lynch moved and the motion was seconded by John M. Bloxom that the officers sign a certified copy of Corporate Resolution authorizing loans and that same be made part of these minutes. Motion was carried.

There being no further business for consideration, the meeting was adjourned.

s/s J. M. Bloxom
Secretary

Attest:

/s/ Fred B. Plath
President

Above minutes approved

/s/ P. J. Lynch
Trustee

Exhibit 2

WASHINGTON FRUIT & PRODUCE COMPANY

AGREEMENT

February 28, 1944.

On February 28, 1944, the following stockholders of the Washington Fruit & Produce Company received a dividend of 21,977 boxes, field-run Winesaps, listed in the minutes of a meeting of trustees and stockholders of the Company on that date.

It is agreed that the company shall store, prepare for market, and market these field-run Winesaps for the stockholders; and, to facilitate the handling of these apples, the stockholders agree to place their respective holdings of these field-run Winesaps in one pool for marketing purposes.

As these Winesaps are prepared for market and marketed, the Company will charge this pool with the storage, washing, sorting, etc., at the lowest rate made any other owner of apples in the Company's storage during the 1943-1944 season; and, when the net proceeds of the sale of this Winesap pool are determined, will divide said proceeds among the stockholders in the following percentages, which are the same percentages as the stockholders' interests appear in the field-run Winesaps placed in this pool: Fred B. Plath 58%, P. J. Lynch 25%, J. M. Bloxom 17%.

Washington Fruit & Produce Company

By /s/ *Fred B. Plath*, President

Stockholders: /s/ Fred B. Plath
/s/ P. J. Lynch
/s/ J. M. Bloxom

JMB:RW

No. 12,814

IN THE

United States

Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

P. J. LYNCH,
Appellee,

P. J. LYNCH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee,

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

BRIEF FOR P. J. LYNCH

VELIKANJE & VELIKANJE
E. F. VELIKANJE
S. P. VELIKANJE
JOHN S. MOORE, JR.
Attorneys for Appellee-Appellant

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CITATIONS

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1. Case

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

BRIEF FOR P. J. LYNCH

JURISDICTION

This action was brought in the federal district court as within the provisions of Title 28, United States Code, Sections 1346 (a) (1), and 1402 (a). P. J. Lynch, Plaintiff and appellee-appellant, is a resident of the State of Washington, and the amount sued for in the instant case was $10,000.00 including interest but exclusive of costs. (R. 3, 6, 7).

The case comes within the usual appellate jurisdiction of this Court upon appeal from final judgments in actions

at law or in equity, Title 28, United States Code, Section 1291. Final judgment was entered October 30, 1950, granting judgment to plaintiff upon the "dividend in kind" issue and dismissing plaintiff's claim based upon the "accrual of storage income" issue. (R. 18). Defendant filed notice of appeal upon the judgment granted plaintiff on December 27, 1950 (R. 19); plaintiff filed notice of appeal upon the judgment denying plaintiff recovery upon the "accrual of storage income issue" on December 28, 1950. (R. 22).

QUESTIONS PRESENTED

The appeal by the United States presents the question of whether or not a dividend of fruit to stockholders of the Washington Fruit & Produce Company, a corporation, was in fact a true dividend, as found by the Trial Court.

The appeal of P. J. Lynch presents the question of whether storage accounts of said corporation, normally and customarily not accrued, must be accrued upon dissolution and liquidation of the corporation as income, where operation of the business continues thereafter under all former stockholders as partners.

STATUTES INVOLVED

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) *General Definition*—"Gross income" includes gains, profits, and income derived from salaries, wages or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property;

also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * * (26 U. S. C. 1946 ed., Sec. 22).

SEC 115. DISTRIBUTIONS BY CORPORATIONS.

(a) *Definition of Dividend*—The term "dividend" when used in this chapter * * * means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the taxable year * * * . (26 U. S. C. 1946 ed., Sec. 115).

STATEMENT OF THE CASE

This is one of seven companion cases brought by seven individuals for the recovery of excess profits taxes and declared value excess profits taxes assessed against said persons as transferees of the Washington Fruit & Produce Company, a corporation, of Yakima, Washington. At the trial of this action it was stipulated by counsel for the respective parties that a determination of the instant case would be decisive of the same questions to be determined in the other six actions. (R. 26-27). It has further been stipulated between counsel that a determination of the instant case upon appeal will be decisive of the same questions to be determined in the other six actions now upon appeal. These six actions are entitled and numbered in United States Court of Appeals for the Ninth Circuit as follows:

Marian L. Bloxom vs. U. S. A.....No. 12820
Dolores Plath vs. U. S. A.....No. 12821
M. Gail Plath vs. U. S. A.....No. 12822
M. Gail Plath, Exec. vs. U. S. A.....No. 12823

Fred M. Plath vs. U. S. A.....No. 12824
John M. Bloxom vs. U. S. A.....No. 12825

Two questions only were presented to the Court for determination:

(1) The validity of the declaration of a dividend in kind to the stockholders of the Washington Fruit & Produce Company, a corporation; and

(2) The right of the Collector of Internal Revenue to increase the income of that corporation at the time of its liquidation by adding to the corporate income, and thus accruing as income, certain storage accounts.

The action was tried to the court without a jury. The court made and entered findings of fact and conclusions of law (R. 11-15), and entered judgment for plaintiff upon the "dividend in kind" issue in the amount of $2,152.75 plus interest as provided by law and plaintiff's costs; the judgment also dismissed with prejudice plaintiff's claim based upon the "storage accrual" issue. (R. 18, 19). Defendant appeals from the judgment in favor of plaintiff while plaintiff appeals from the judgment of dismissal.

The basic facts of the case are not in issue; primarily, the dispute involves the interpretation of certain agreed facts.

For the sake of clarity, the facts relating to the "dividend in kind" issue will be set forth first, followed by the facts relating to the "storage accrual" issue.

During the year 1944, on February 28th, a meeting of the board of trustees of the Washington Fruit & Produce Company, a corporation, was held. At this meeting there

were present Fred B. Plath, P. J. Lynch and John M. Bloxom, who held in their names all of the stock of the corporation. Of the business transacted at this meeting was the declaration of a dividend to the stockholders of 21,977 boxes of apples of field-run Winesaps out of certain lots then held at the company's warehouse and owned by the company. The dividend was to be divided among the three stockholders in ratio to their stockholdings; that is, 12,747 boxes to Plath, 5,494 boxes to Lynch and 3,736 boxes to Bloxom (R. 29, 30; Exh. 1-a). Of the total 100 shares of stock in the corporation, 58 shares belong to Plath interests, 25 shares to Lynch interests and 17 shares to Bloxom interests.

Thereafter, on February 28, 1944, Fred B. Plath, P. J. Lynch and John Bloxom entered into an agreement which provided for the pooling of the 21,977 boxes of apples; as owners of the pool, the three individuals entered into a contract with the corporation for storing, preparing for market, and marketing of the apples by the corporation (Exh. 2). It was further agreed that the corporation would charge the pool for storage, washing, sorting, etc., as these expenses were incurred, and, following sale of the apples, disburse the net proceeds to the pool owners in proportion to their respective interests in the apples. This agreement was performed, the apples were sold, and the net proceeds disbursed. The company handled the apples in the same manner as it was handling apples for other parties (R. 33).

The three stockholders considered the fair value of

the assets received as a dividend in kind as dividend income and paid taxes on such fair value for the year 1944 upon such basis. On April 29, 1944, the corporation, Washington Fruit & Produce Company, was dissolved. Later, appellee-appellant Lynch, as one of the transferees of the Washington Fruit & Produce Company, a corporation, was assessed his proportionate share of the excess profits tax and declared value excess profits tax claimed to be due the federal government from the corporation for the tax period ending April 29, 1944. The tax claimed to be due was increased by virtue of the inclusion, as income of the corporation, the sum of $8,939.79, this being the amount of excess value received by the stockholders of the corporation in the later sale of the apples distributed as dividend in kind over the basis of these apples to the corporation. This increase of income was based upon a ruling by the Commissioner of Internal Revenue, that the dividend in kind was not a true dividend.

Also during the year 1944, and prior thereto, the Washington Fruit & Produce Company, a corporation, was engaged in storing fruit and other commodities. Some of the storage was under contract with the Federal Surplus Commodities Corporation. According to the contract, payment for storage was to be contingent upon full compliance with all conditions of the agreement (Exh. 4). It was further shown by the evidence that as to this contract, as well as with all other storage provided by the corporation, it was normal procedure and custom to await shipment of the

merchandise from storage before making any charge therefor. It was further shown that such procedure was customary with the majority of warehouses in the Yakima area (R. 40, 41).

Following the dissolution of the corporation on April 29, 1944, transferee assessments were levied against appellee-appellant Lynch and all other transferees of the corporation, for excess profits tax and declared value excess profits tax, for the tax period ending April 29, 1944. The tax claimed to be due was increased by virtue of the inclusion, as income of the corporation, the sum of $37,225.96, this being the figure computed to be the worth of storage accounts as of April 29, 1944, if accrued. This increase of income was based upon a ruling that the corporation, as of the date of liquidation, had the right to payment for said storage accounts, and that said storage accounts should be accrued, and thus included as income to the corporation for that tax period. The corporate tax year normally ended on June 30th.

Thereafter, appellee-appellant paid his proportionate share of the transferee assessments and timely filed his claim for refund, which claim was rejected.

SPECIFICATION OF ERRORS

1. Inasmuch as all of appellee - appellant Lynch's claims of error as set forth in the Statement of Points on which he intends to rely on appeal (R. 22-24) are absolutely linked together, for all practical purposes, under one claim of error generally, i. e., failure of the court to render judg-

ment in favor of the plaintiff on the "storage accrual" issue, it is felt that the argument as to the error of the court should be directed generally to the "storage accrual" issue, with specific direction as follows:

(a) Failure of the Court to sustain the corporate method of accounting as properly reflecting corporate income;

(b) Action of the court in considering dissolution of corporation as of weight in determining whether storage accounts should be accrued as income; and

(c) Action of the court in sustaining Commissioner's requirement that the corporate method of accounting be set aside and that storage accounts thus be accrued as income.

ARGUMENT

In this argument appellee-appellant Lynch will present the contentions in opposition to the lower Court's dismissal of the "storage accrual" portion of the case, then take up those in support of the judgment rendered in favor of the taxpayer upon the "dividend in kind" issue, and thereafter answer the brief of appellant-appellee, United States of America.

STORAGE ACCRUAL ISSUE

A. *The method of accounting was a true reflection of corporate income.*

In the course of its operation, Washington Fruit & Produce Company, a corporation, followed a hybrid method of accounting. As with most concerns, this method of ac-

counting was not, and could not be, on a 100% cash, accrual, or completed contract basis. As in the case of the ranch, owned and operated by the corporation, ranch expenses from January 1 to the closing date of the fiscal year were capitalized as deferred charges. Crops growing or to be grown were carried over to the year in which harvest occurred (R. 125). This method of accounting for the ranch was accepted by the Internal Revenue Service. On the other hand, warehouse storage income generally was accounted for upon a completed-contract basis. As to the storage of fruit, and other commodities, it was shown that for years the procedure had been to account for expenses involved in the operation of the warehouse and the storage provided customers as these expenses were incurred. As to income from storage provided, the method tended to be a completed contract type of accounting. No charges were made to the owner of the commodity, nor was there, by custom, any right or expectation of payment for storage until such time as the fruit or other commodity was removed from storage. At that time, storage charges were computed, and if the commodity was delivered in good condition from storage, the company was then entitled to bill and receive payment (R. 40-43, 60, 65-67, 76-78). There can be no question but that the method of handling the storage accounts was a true reflection of the income from storage accounts, even though another method or other methods were used in other phases of corporate activity, and regardless of the particular name given to the method. As

stated in KENTUCKY COLOR & CHEMICAL CO. vs. GLENN, D. C. Ky., 87 F. Supp. 618, 620:

> "In the case of *Osterloh v. Lucas,* supra, the Court said, 37 F. 2d at page 278—'The case turns largely upon what is meant by the requirement that the method of accounting shall clearly reflect the income . . . In our opinion, all that is meant is that the books shall be kept fairly and honestly; and when so kept they will reflect the true income of the taxpayer within the meaning of the law. In other words, the books are controlling, unless there has been an attempt of some sort to evade the tax. This construction may work to the disadvantage of the taxpayer or the government at times, but if followed out consistently, and honestly, year after year, the result in the end will approximate equality as nearly as we can hope for in the administration of a revenue law.' "

In the instant case, in the handling of storage accounts, income had been treated in a uniform manner for many years, as to bookkeeping, claim for and receipt of payment. There has been no question of the fairness and honesty of the bookkeeping. In any individual year, it is true that the government or the taxpayer-corporation might have suffered a disadvantage, but over a period of years the method balances the equities.

In the KENTUCKY COLOR case, (supra), the court discussed the meaning of the term "clearly" in the rule requiring the method of accounting to clearly reflect a taxpayer's income. At page 620:

> "In *Huntington Securities Corporation v. Busey,* 6 Cir., 112 F. (2d) 368, 370, the term 'clearly' within this section is defined as 'plainly, honestly straightforwardly and frankly' but does not mean 'accurately,' which in its ordinary use means precisely, exactly, correctly, without error or defect. . . ."

The above quotation, together with the decision in that case, stands basically for the rule that regardless of the name given to the method of accounting or the government's desire for adherence to the cash or accrual or other basis, the only real requirement is that, over the years, the books reflect with reasonable clarity each year's income. This rule is satisfied by the method hereinabove outlined as in use by the Washington Fruit & Produce Company, the corporation. As shown, by custom and established practice, the corporate taxpayer, in assuming the duty of storage, assumed the liability for safe storage; a loss of stored goods would result in loss of right to demand storage at the end of the storage period. Likewise, by custom and established practice, book entries and demand for payment for storage awaited satisfactory removal of the property from the warehouse. Both the corporation operating the warehouse, and those owning property in storage understood the storage contract to be that there woud be no right to receive payment for storage until after it had been completed. Thus, accounting reflected income clearly.

B. *Corporate dissolution should not affect the method of accounting.*

It is the contention of the government that the dissolution of the corporation on April 29, 1944, is sufficient cause for avoiding the normal procedure of accounting for storage. Such cannot be sustained for the corporation had no right to the receipt of the storage accounts as of the date of dissolution; receipt necessarily awaited completion of

the storage contract. A demand by the corporation for payment of these accounts as of April 29, 1944, would legally have been denied. As stated in FRANKLIN COUNTY DISTILLING COMPANY vs. COMMISSIONER OF INTERNAL REVENUE, 6th Cir., 125 F. (2d) 800, 804:

> "Keeping accounts and making returns on the accrual basis as distinguished from the cash basis, import that it is the *right* to receive and not the actual receipt that determines the inclusion of the amount in gross income. When the right to receive an amount becomes fixed, the right accrues. . . .
>
> "When accounts are kept on an accrual basis, income must be accounted for in the year in which realized, although not then actually received; and deductions should be taken in the year in which the deductible items are incurred."

Had the corporation kept storage income accounts upon a true accrual basis, these accounts would have been treated as income on the date of dissolution, had they been fixed and ascertainable as of that date. However, the method was not a true accrual basis and the accounts were not definitely fixed and ascertainable as of that date, as hereinabove set forth. The method used was similar to a completed contract basis, requiring full performance before the account could be computed with any degree of accuracy, and before payment could be demanded, and then only if the fruit were released from storage in good condition.

In H. LIEBES & CO. vs. COMMISSIONER OF INTERNAL REVENUE, 9th Cir. 90 F. (2d) 932, 938, the Court states:

"The complete definition would therefore seem to be

> that income accrues to a taxpayer when there arises to him a fixed or unconditional right to receive it, if there is a reasonable expectancy that the right will be converted into money or its equivalent."

Following the citation and quotation of a number of cases on the rule that income doesn't accrue until there is an unconditional liability on behalf of a party to pay it to the taxpayer, the court states, at page 937:

> "We may conclude that income has not accrued to a taxpayer until there arises to him a fixed or unconditional right to receive it."

Thus, even were the method of accounting followed by the corporation considered to be the accrual method, the storage accounts could not be considered income as of the date of dissolution, for the reason that the right to receive the payment therefor was conditional—(1) upon completion of the storage contract and removal from the warehouse; and (2) removal of the products in good condition.

Dissolution of the corporation on April 29, 1944, did not create as income accounts which would not be definitely ascertained as probable of receipt until the completion of the storage contract.

C. *The Commissioner is without right to require a change in the method of accounting.*

As set forth herein, taxpayer-corporation had for years followed the customary procedure in accounting for storage income—that is, a completed contract of storage before income. By virtue of such manner of accounting, and because of business practices and trends, there was a true reflection of income in each year's return. The use of the

fiscal year acted as a balance wheel. There is no valid reason why the government should be entitled to disregard prior acceptable practices and require a change of accounting during the year of dissolution in order to increase taxpayer-corporation's burden. In COMMISSIONER OF INTERNAL REVENUE vs. MNOOKIN'S ESTATE, 8th Cir., 184 F. (2d) 89, 92, taxpayer reported upon the accrual basis except as to receipts from credit sales, which were reported on a cash basis. In overriding the government's contention that all receipts should have been reported upon the accrual basis, the Court said:

> "The taxpayer's method of accounting will control the time as of which income must be reported and deductions allowed. The courts hold that neither income nor deductions may be taken out of the proper accounting period for the benefit of the government or the taxpayer. *Security Flour Mills* Co. *v. Commissioner,* 321 U. S. 281, 285, 287, 64 S. Ct. 596, 88 L. Ed. 725."

It is, of course, definite, that the Commissioner may require a different method of accounting where the method used by the taxpayer does not clearly reflect income. However, as in the instant case, the Commissioner may not disregard an established practice apparently approved in prior years which does actually accomplish the requirements therefor. The ruling by the Commissioner here may be considered in error in two phases: (1) an apparent attempt to modify or completely change a method of accounting; and (2) an apparent attempt to identify as income that which is not income. Such action is similar to that found in COMMISSIONER OF INTERNAL REVENUE vs. ED-

WARDS DRILLING CO., 5th Cir., 95 F. (2d) 719, 720, wherein it was stated:

> "It is of course true, as the Board points out, that under the accrual method of accounting employed by petitioner, items must be accrued as income when the events occur to fix the amounts due and determine liability to pay. . . . Generally speaking, however, the income tax law is concerned, and its administration should deal only with realized losses and realized gains. . . . A strained construction in administrative efforts to accrue income should be avoided."

It is submitted that the method of accounting followed by the corporate taxpayer was correct and clearly reflective of its income; that the accrual of the storage accounts as income as of the date of dissolution constitutes a "strained construction" on the part of the Commissioner of the revenue laws; and, further, that the District Court was in error in upholding that "strained construction" and dismissing that portion of appellee-appellant's claim.

DIVIDEND IN KIND ISSUE

A. *Argument in support of judgment*

The government's opposition to the dividend in kind transaction is apparently based upon the theory that the transaction was not a "dividend" for tax purposes but was in fact a sale of the apples by the corporation with a distribution of the net proceeds to the stockholders, and further that the transaction was in fact an anticipatory assignment of income. As in the "storage accrual" issue there is little dispute as to the facts themselves.

The trustees declared a dividend of apples owned by the corporation. These apples were in lots, readily dis-

tinguishable, and each separately held in storage. Following the declaration of the dividend, the stockholders entered into a pooling agreement, and then executed a contract with the corporation for the processing, storage, sale and distribution of the fruit. Following the sale and the receipt of the sales price, the proceeds, less handling charges of the corporation, were distributed to the pool owners in accordance with each individual's share in the pool. This form of transaction has been recognized by our courts in a number of cases. (RIPY BROTHERS DISTILLERS. INC. vs. COMMISSIONER OF INTERNAL REVENUE, 11 T. C. 326; HOWELL TURPENTINE COMPANY vs. COMMISSIONER OF INTERNAL REVENUE, 5th Cir., 162 F. (2d) 319; UNITED STATES vs. CUMMINS DISTILLERIES CORPORATION, 6th Cir., 166 F. (2d) 17; HINES vs. UNITED STATES, 7th Cir., 90 F. (2d) 957).

In the RIPY case, (supra), taxpayer-corporation declared a dividend of whiskey to its stockholders, payable in warehouse receipts of one and two-tenths barrels of whiskey for each share of common stock, there being a total of 1152 barrels of whiskey to be distributed. On the next day, taxpayer corporation wrote letters to each of its 20 stockholders advising of the dividend declaration and further of the agreement on the part of the corporation's attorney to handle the paper work in connection with the sale of the whiskey. The letters included a statement that recommended the sale of the whiskey to Schenley which had a contract for future production by the corporation. Stock-

holders were requested to advise the corporation of their desire to have the corporation turn over their warehouse receipts to the attorney if such met with their approval. The barrels were at that time kept in government bonded warehouses of the corporation, under taxpayer-corporation's name. No stockholder could have obtained his whiskey from the warehouse due to licensing requirements and failure to have the warehouse receipts.

Thereafter, the corporation delivered the receipts to its attorney, but the date of delivery preceded the date fixed in the resolution declaring the dividend as the date for payment of the dividend in kind. Within one week, counsel for the corporation sold the warehouse receipts to an affiliate of Schenley. These receipts were delivered without the endorsement of any of the stockholders, having only the endorsement of taxpayer-corporation. Net proceeds of the sale were delivered to stockholders six weeks after the dividend declaration and twenty-four days after delivery of the receipts to the attorney. The Commissioner ruled that the profits of the sale should be taxable to the corporation.

The Tax Court sets forth in the opinion that basically the question to be determined is whether the subsequent sale was by the stockholders or by the corporation, it being the government's contention that although the transaction was in form the declaration of a dividend in kind with sale by stockholders, in substance it was a sale by the corporation. And the Court further states that this is a question

of fact. It was shown that the receipts were delivered to the attorney without restriction, as negotiable instruments. The inability of the stockholders to obtain actual possession of the whiskey was held to be immaterial. Whiskey was scarce; there was a seller's market, except as to price which was regulated. After citing the CUMMINS case, the Tax Court held that the dividend in kind was correct and that the sale was by the stockholders through the attorney as their agent.

In the CUMMINS DISTILLERIES case (supra), the directors discussed liquidation of the corporation for some months and finally called a stockholders' meeting to reach some conclusion on the matter. At the meeting complete liquidation and dissolution was authorized. The plan included the distribution to common stock owners of warehouse receipts for 51,694 barrels of whiskey. Shortly thereafter the stockholders elected a committee to receive title to the receipts, sell them, and distribute the proceeds. Substitute receipts were issued upon the committee securing the release of indebtedness against the original receipts. The committee then obtained the services of a whiskey broker to sell the receipts, which was done. Within a month from the time the original plan had been adopted, the net proceeds had been distributed to the majority of the stockholders.

In the CUMMINS opinion, the Sixth Circuit Court sustains the rule that there is nothing unlawful or unethical in a taxpayer taking steps to avoid the burden of taxation.

Quoting from CHISHOLM vs. COMMISSIONER OF INTERNAL REVENUE, 2nd Cir., 79 F. (2d) 14, 15, the court says:

> "The question always is whether the transaction under scrutiny is in fact what it appears to be in form. . . . The purpose which counts is one which defeats or contradicts the apparent transaction, not the purpose to escape taxation."

In sustaining the transaction in the CUMMINS case (supra), the court, on page 21, says:

> " . . . where the corporation declares and pays a dividend in kind to its stockholders and the stockholders upon their own responsibility dispose of corporate assets so assigned, a gain realized from this sale may result in income to stockholders but none to the corporation. . . . That is this case. The corporation here involved had neither agreed nor negotiated for the sale of its assets prior to liquidation. It had had no dealings with Weiss. It had been considering liquidation for some time prior to actual decision and the reasons for so deciding are plain. The liquidation was not unreal or a sham. The stockholders acted upon their own responsibility and at their own risk . . . the receipts were in law and in fact sold by the stockholders or on their behalf and not by the corporation."

Taking the viewpoint of the CUMMINS and RIPY cases, and applying it to the instant case, it is readily apparent that a legitimate dividend in kind was declared by the trustees; the apples distributed were in the warehouse in distinguishable lots and available to any stockholder who might wish to obtain them. Constructive possession was taken by the stockholders. As in the RIPY case, there was a ready market for the apples, and it was only natural that the apples would be sold within the near future, because

of that fact and the perishable nature of the commodity. There was no economic reason why the stockholders, as owners of the apples, should transfer them to some other fruit warehouse for processing, shipping, and selling. To do so would have been taking a ridiculous step. Thus, the agreement was made between the stockholders, as owners of the pool, and the corporation, for the handling and selling of the apples, and the remitting of net proceeds, as agents for the pool owners. These apples had not been sold nor had the corporation entered into agreements to sell the apples prior to the distribution. At most there was an available market as in the RIPY case.

B. *Answer to brief of appellant-appellee United States of America.*

Primarily, there is little dispute between appellant-appellee and appellee-appellant as to either the facts or the law; the dispute arises in the interpretation of the facts and the application of the law. A reading of the Statement and Arguments contained in the Government's brief, indicates that the objections to the validity of the dividend in kind transaction stem, in the main, from an emphasis of five points:

(a) the purpose of the declaration being the saving of income taxes;

(b) the contract between the stockholders and the corporation for the marketing of the apples was entered into on the same day as the declaration of the dividend;

(c) the stockholders at no time took actual physical possession of the apples or moved the apples from their separate locations within the warehouse;

(d) the apples were sold within a two months' period after the declaration of the dividend;
(e) the corporation had orders available for acceptance at the time of the declaration of the dividend.

From these five points, appellant-appellee argues that the dividend was a sham and an anticipatory assignment of income. We shall answer these contentions by a discussion of the above five points.

(1) *The Facts:*

Appellant-appellee argues that because of the testimony that the purpose of the declaration was to "save income tax" (R. 97), the dividend in kind was not a genuine transaction. The theory appears to be that taxpayers shall never take any step, regardless of its legality, if the desire is to reduce or avoid the payment of taxes. "Business purpose" is a claimed requisite to validate all actions. Individuals and corporations engage in business for the sole purpose of making profits; taxes reduce profits. What better business purpose can be found, from the viewpoint of the taxpaying businessman or corporation, than the reduction of taxes resulting in the increase of profits. So long as the transaction in question is clearly a valid dividend with subsequent profits to those receiving the dividends, the desire to reduce taxes is immaterial. This desire becomes important and material when the transaction is clearly one to set aside that which is actually the profit of the corporation, as in the cases cited by appellant-appellee, COMMISSIONER v. COURT HOLDING CO., 324 U. S. 331, 89 L. Ed. 981, 65 S. Ct. 707; COMMISSIONER vs. FIRST STATE

BANK, 5th Cir., 168 F. (2d) 1004. As stated in GREGORY vs. HELVERING, 293 U. S. 465, 469, 79 L. Ed. 596, 55 S. Ct. 266:

> "It is quite true that if a reorganization in reality was effected, within the meaning of subdivision (B), the ulterior purpose mentioned will be disregarded. The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted."

In other words, if the transaction is proper, a taxpayer is entitled to enter that transaction to reduce or avoid taxes. The United States, on the other hand, attempts to invoke a rule that if the primary motive is to reduce or avoid taxes, the transaction is automatically a sham. Such was and is not the intent of our Supreme Court, as indicated in the GREGORY case, supra.

Appellant-appellee seeks to hold the declaration of the dividend a sham because of the speed with which the transaction occurred, both as to the execution of the contract between the stockholders and the corporation, and the sale of the apples. The cases of CUMMINS DISTILLERIES, HOWELL TURPENTINE, RIPY BROTHERS DISTILLERIES, and HINES, supra, are a complete answer. In the HOWELL TURPENTINE case, (supra), the facts are as to the speed closely similar to the instant case, and the dividend was sustained. The instant case has additional factors requiring urgent action. As shown by the testimony, apples are harvested in the fall and placed in cold storage warehouses. Prior to sale, the apples must be washed, sorted and packed before shipping. All apples are normally

sold before the end of the summer following their harvest. These apples had not been washed, sorted and packed, and it was necessary that immediate action be taken for their sale within the two months following the dividend; any sale after April required packing prior to February, the date of the declaration (R. 65). This, then, indicates the basis for the speed with which the stockholders began action to sell and did sell the apples. Loss of time meant a loss of fruit through deterioration, and thus loss of profits to the owners of the pool, the stockholders.

The additional contention by appellant-appellee is that the dividend in kind was a sham because the actual physical possession of the apples was never changed. As stated previously, the apples were in lots, marked and segregated, in the warehouse. It was to the advantage of the pool owners to contract with the corporation for their handling; it was to the advantage of the corporation to earn a profit on this handling. No good business reason existed for the taking of physical possession by the stockholders, although they had this right. A transfer to another warehouse for handling would merely have increased the cost to the individual owners. All representative stockholders were active in the business where the apples were stored and, therefore, had physical possession of all the marked lots declared as a dividend. The pattern of procedure set forth by the contract between the pool owners and the corporation, and thereafter consummated, was the most efficient, economical manner of handling the fruit.

The fifth contention of the appellant-appellee is that there was not a true dividend because there were many available orders. This situation existed in the RIPY case, supra. From the situation of available orders, appellant-appellee attempts to find a sale by the corporation. Admittedly a seller's market existed, but a seller's market does not create a sale. No sale had been achieved or even orally promised by the corporation until the corporation, as agent for the pool owners, had completed all washing, sorting, packing, *and the fruit was ready to ship* (R. 51). Contrary to statements of United States' attorneys in their brief, there were no unfilled orders on hand. Orders may have been available, but actually none were on hand.

(2) *The Law:*

From the foregoing five points, mainly, appellant-appellee claims that the dividend in kind was an anticipatory assignment of income, and a sham. The law as set forth in the government's brief on page 9, paragraph A, is not opposed by appellee-appellant. However, it must be remembered that the four cases cited at that point, without question, involved sales by the corporation, or at least final negotiations by the corporation, ultimately concluded by the stockholders. Here we have no prior sales, nor even negotiations.

Some mention should be made of the COURT HOLDING case, (supra), and UNITED STATES vs. CUMBERLAND PUB. SERV. CO., 338 U. S. 451, 94 L. Ed. 251. Appellant-appellee, at page 11, attempts to point out that

the distinction between the two cases is a distinction as to rules of law. Actually, the outcome of the two cases differed only upon findings of fact made by the lower court. On the one hand was a finding that the sale which was effected was made by the shareholders rather than the corporation; on the other hand was a finding that the sale was made by the corporation. The findings in each case presented to the court the opportunity to recite two different rules of law. As stated in the CUMBERLAND case, at page 453:

> "Our Court Holding Co. decision rested on findings of fact by the Tax Court that a sale had been made and gains realized by the taxpayer corporation."

And in footnote 3, page 454, the Court says:

> "What we said in the *Court Holding Co.* case was an approval of the action of the Tax Court in looking beyond the papers executed by the corporation and shareholders in order to determine whether the sale there had actually been made by the corporation. We were but emphasizing the established principle that in resolving such questions as to who made a sale, fact-finding tribunals in tax cases can consider motives, intent, and conduct in addition to what appears in written instruments used by parties to control rights as among themselves."

And on page 456:

> "Here, as in the *Court Holding Co.* case, we accept the ultimate findings of fact of the trial tribunal."

It is submitted that the trial tribunal in the instant case made an express finding that the "dividend in kind was a true dividend, taxable as income to the stockholders" (R. 13), and that such finding should be accepted by this Court.

Appellant-appellee claims that the dividend was an anticipatory assignment of income, citing the FIRST STATE BANK case, (supra), and other cases as authority. The distinction between the instant case and the FIRST STATE BANK case is so apparent as to hardly require mention. In the latter case, the alleged dividend was of promissory notes previously charged off as worthless by the Bank. Thus, there was no value to the Bank; the notes did not represent assets but rather potential income. The only action required was collection. In the instant case, the dividend was of corporate assets; the increase in value and resulting income was brought about by processing of the product. That income could not have been obtained but for the processing. OPA governed maximum prices, but did not guarantee a sales price to the stockholders had the price of apples fallen after the dividend declaration. The difference in the value of the apples between the declaration date and after processing is the income in question in this case; thus it can hardly be said that the dividend automatically established the resulting profit. Time, effort, and money increased the value after declaration; the sale of the apples without processing would have resulted in no profit to the stockholders or the corporation.

Appellant-appellee, on page 16 of the brief, makes the following claim:

> "The apples in the corporation's hands without regard to the dividend in kind were more than merely potential income because, as we have pointed out, the corporation had but to accept already existent orders for

> them at the price fixed by O. P. A. prior to the declaration of the dividend. In fact the dividend and the contract of February 28, 1944, would not, apparently, have been made had that not been true."

These statements are not only unsupported by the evidence but are completely without basis. Acceptance of orders on unprocessed fruit prior to the dividend declaration would, of course, not have resulted in the sales price ultimately obtained, as pointed out above. And a maximum sales price by regulation does not guarantee a sale at that price, especially in such a fluctuating market as fruit. It is not known from what source the second sentence of the above quotation was obtained, but we wish to emphasize that there exists no basis for the statement.

The sole questions for determination on the dividend in kind issue are (1) was a dividend in kind intended, and (2) was the resulting situation in keeping with that intention. The District Court has answered these questions in the affirmative by finding that the stockholders took over the assets, assumed the risks of ownership, and following the improvement of the commodity at cost, received a benefit from the sale.

CONCLUSION

The decision of the District Court should be affirmed as to the judgment granted appellee-appellant on the "dividend in kind" issue, and should be reversed as to the judgment of dismissal with prejudice on the "accrual of storage income" issue.

Respectfully submitted,

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No. 12,814

IN THE

United States
Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellant

v.

P. J. LYNCH, Appellee

P. J. LYNCH, Appellant

v.

UNITED STATES OF AMERICA, Appellee

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

REPLY BRIEF FOR THE UNITED STATES

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

REPLY BRIEF FOR THE UNITED STATES

It has been stipulated between the parties hereto that the appeal on each side would be covered in the opening brief of each party filed in accordance with that stipulation, and that each party would file a reply to the brief of the other side. This brief is the reply of the United States in the taxpayer's appeal.

QUESTION PRESENTED

The appeal of the taxpayer presents the question of whether or not the Commissioner of Internal Revenue erred in including as income to the Washington Fruit and Produce Company certain storage charges which had been earned during its taxable period ended April 29, 1944.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but * * * if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. * * *
(26 U.S.C. 1946 ed., Sec. 41.)

SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. * * *

* * * * *

(26 U.S.C. 1946 ed., Sec. 42.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

Sec. 29.41-1. *Computation of Net Income.*—Net income must be computed with respect to a fixed period. Usually that period is 12 months and is known as the taxable year. Items of income and of expenditure which as gross income and deductions are elements in the computation of net income need not be in the form of cash. It is sufficient that such items, if otherwise properly included in the computation, can be valued in terms of money. The time as of which any item of gross income or any deduction is to be ac-

counted for must be determined in the light of the fundamental rule that the computation shall be made in such a manner as clearly reflects the taxpayer's income. If the method of accounting regularly employed by him in keeping his books clearly reflects his income, it is to be followed with respect to the time as of which items of gross income and deductions are to be accounted for. (See sections 29.42-1 to 29.42-3, inclusive.) If the taxpayer does not regularly employ a method of accounting which clearly reflects his income, the computation shall be made in such manner as in the opinion of the Commissioner clearly reflects it.

Sec. 29.41-2. *Bases of Computation and Changes in Accounting Methods.* — Approved standard methods of accounting will ordinarily be regarded as clearly reflecting income. * * * All items of gross income shall be included in the gross income for the taxable year in which they are received by the taxpayer, and deductions taken accordingly, unless in order clearly to reflect income such amounts are to be properly accounted for as of a different period. * * *

* * * * *

Sec. 29.41-3. *Methods of Accounting.*—It is recognized that no uniform method of accounting can be prescribed for all taxpayers, and the law contemplates that each taxpayer shall adopt such forms and systems of accounting as are in his judgment best suited to his purpose. Each taxpayer is required by law to make a return of his true income. He must, therefore, maintain such accounting records as will enable him to do so. * * *

* * * * *

Sec. 29.41-4. *Accounting Period.*—The return of a taxpayer is made and his income computed for his taxable year, which in general means his fiscal year, or the calendar year if he has not

established a fiscal year. (See section 48.) The term "fiscal year" means an accounting period of 12 months ending on the last day of any month other than December. * * *

Sec. 29.42-1. *When Included in Gross Income.*—(a) *In general.*—Except as otherwise provided in section 42, gains, profits, and income are to be included in the gross income for the taxable year in which they are received by the taxpayer, unless they are included as of a different period in accordance with the approved method of accounting followed by him. * * *

* * * * *

STATEMENT

Inasmuch as the facts relating to the appeal of the United States are set forth in its opening brief, this statement will be limited to the issue raised in the taxpayer's appeal. The facts relating to that issue, as found by the court below and as adduced in evidence, may be summarized as follows:

The Washington Fruit and Produce Company, a corporation, hereinafter called the Company, was engaged in the handling, growing, marketing and warehousing of fresh fruits and vegetables. (R. 12.) The company also engaged in the business of storing fruit, meat and other products. (R. 38.) Its charges for storage were normally billed against customers at the time the stored goods were removed from its warehouse (R. 40, 93) and this was the general practice of the business in the community in which the Company operated (R. 41, 93, 111). This practice was followed because of the potential spoilage and loss of stored goods. (R. 76, 93, 114-115.) The Company endeavored to protect itself against this potential spoilage by appropriate insurance coverage. (R. 41.)

The Company kept its books (R. 44) and rendered its income tax returns (R. 124) upon the accrual basis

as of June 30, the end of its fiscal year (R. 45, 88, 115). It generally accrued expenses incident to the operation of its business (R. 61, 65, 121, 133) but storage charges collectible by it were not included in income until paid (R. 59, 65-66). This practice, however, usually did not preclude correct reflection of income for the fiscal year because ordinarily most of the stored goods were removed from its warehouse and sold by or before June 30 each year in the normal operation of the Company's business. (R. 46, 88-89, 115, 116.) There was not a great deal of loss by spoilage. (R. 101.)

The Company was voluntarily liquidated on April 29, 1944. (R. 12, 38.) At that time, and for some time prior to that date, it had a contract with the Federal Government for the storage of various products, (R. 41, 93.) These products, which at the date of liquidation were valued at between two and three millions of dollars (R. 41), were stored under a contract which specified a monthly storage charge (R. 17, 94, 118). At April 29, 1944, the storage charges earned upon the government products stored at the Company's warehouse amounted to $37,225.96. (R. 117.) No part of this amount was included in income in the Company's return for the period ended April 29, 1944, the date of its liquidation (R. 117, 121), but this amount was shown as the value of the government's storage account for purposes of liquidation of the Company (R. 117, 118-119, 120, 128). The products stored for the government ordinarily would remain in the Company's warehouse from one to six months, awaiting ships for loading and transshipment (R. 58, 129) and that in storage at April 29, 1944, was only that which had not been removed because of no means of transshipment (R. 58).

The Commissioner of Internal Revenue concluded under these facts that the return filed for the period ended April 29, 1944, did not truly reflect the Company's income for that period and accordingly included the amount of $37,225.96 as a part of the latter's taxable income. (R. 13.) In this suit brought by the taxpayer and his associate stockholders, transferees of the assets of the Company, the District Court held (R. 17) that the inclusion of this amount, as required by the Commissioner, more truly reflected the Company's income because "the contract provides that storage shall be computed on a monthly basis" and rendered judgment on this issue for the United States (R. 18-19). From that decision the taxpayer has appealed. (R. 22.)

SUMMARY OF ARGUMENT

The taxpayer concedes that the Commissioner may require a different method of accounting in order that income may be clearly reflected. In the light of the applicable statutory provision that means that the Commissioner was within his province in requiring the Company to report receipts and profits in a manner which would clearly reflect income for the period involved. It is of no avail then to rely upon acceptance of the method of reporting prior to that period or to insist that the Commissioner could not change that method. By placing in gross income for the taxable period ended April 29, 1944, the storage charges of $37,225.96 which had actually accrued during that period the Commissioner, far from repudiating the fundamental basis or method upon which the Company computed its income, merely applied that method, i.e., the accrual, to all items of income and expense. It is the event of dissolution which caused the Commissioner to include the storage charges in

the Company's income for the period up to the date of its dissolution and it is that event which gives rise to this case.

The law is well fixed in circumstances paralleling and on all fours with those in the instant case that when returns are made upon the accrual basis there need be only reasonable accuracy in calculating amounts to be accrued as income and that a taxpayer is bound to accrue in a certain year those items with respect to which there is justification for reasonable expectancy of payment in due course. Where a corporation, upon a completed contract basis of reporting income, dissolves and transfers its assets and liabilities to its stockholders, who continue and complete the contracts, it puts itself in a position where it can never complete its contracts. But that does not absolve it from its income tax liability and under those circumstances the Commissioner has authority to allocate to it income earned by it prior to dissolution.

In this case the Company put itself in the position of never completing its contract of storage entered into prior to its dissolution and the Commissioner was, therefore, entirely correct and acting within statutory authority in including storage charges earned prior to the date of dissolution in the Company's income. This was especially true because all events had taken place prior to that date to fix the amount and there was more than reasonable expectancy of converting that amount into money.

ARGUMENT

THE COMMISSIONER OF INTERNAL REVENUE CORRECTLY INCLUDED EARNED STORAGE CHARGES UP TO APRIL 29, 1944, IN THE GROSS INCOME OF THE WASHINGTON FRUIT AND PRODUCE COMPANY WHICH WAS LIQUIDATED ON THAT DATE.

The taxpayer concedes here (Br. 18) that the Commissioner may require a different method of accounting where the method used by the taxpayer does not clearly reflect income. This concession, of course, rests upon the provisions of Section 41 of the Internal Revenue Code, *supra,* which requires that "if the method employed [by the Company] does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income." As the Supreme Court stated in *Brown v. Helvering,* 291 U.S. 193, 203:

> Moreover, the method employed by the taxpayer is never conclusive. If in the opinion of the Commissioner it does not clearly reflect the income, "the computation shall be made upon such basis and in such manner," as will, in his opinion, do so. *United States v. Anderson,* 269 U.S. 422, 439; *Lucas v. American Code Co.,* 280 U.S. 445, 449; *Lucas v. Ox Fibre Brush Co.,* 281 U.S. 115, 120; compare *Williamsport Wire Rope Co. v. United States,* 277 U.S. 551; *Lucas v. Structural Steel Co.,* 281 U.S. 264. In assessing the deficiencies, the Commissioner required in effect that the taxpayer continue to follow the method of accounting which had been in use prior to the change made in 1923. To so require was within his administrative discretion; compare *Bent v. Commissioner,* 56 F. (2d) 99.

In *Carver v. Commissioner,* 173 F. 2d 29 (C.A. 6th),

the court held that the fact that in previous years the Commissioner had accepted returns upon a basis other than that required in the taxable period involved will not preclude him from insisting upon a method which will clearly reflect the income for the period being audited. *William Hardy, Inc. v. Commissioner,* 82 F. 2d 249-250 (C.A. 2d), states the same rule.

In the light of this situation it is apparent that the taxpayer's argument (Br. 12-15) relating to the method which was accepted in prior years, and the authorities there cited, are of no avail to him here. Nor is there any merit in his urging (Br. 17-19) that the Commissioner has no right to change the method of accounting for the taxable period for the alleged reason that the method already employed by the Company clearly reflected its true income. The fact is that the method used by the Company for the period involved did not clearly reflect income, and this in effect was the Commissioner's finding (sustained by the District Court) when he required the inclusion in taxable income of the $37,225.96 in question.

In the normal operation of the Company's business in years prior to the fiscal year here in question earned storage charges were reported as income upon the removal of stored goods which usually took place before the close of the Company's fiscal year. As a matter of fact it appears from the record in this case that the fiscal year ending June 30 had been adopted for reporting purposes simply because that situation existed. (R. 45-46, 88, 115.) But regardless of how clearly the method employed by the Company with respect to reporting earned storage charges in the prior normal operating years might have reflected true income, it is apparent that such method failed

to clearly reflect income in the year of the Company's liquidation which took place on April 29, 1944.

There is, therefore, no point in urging (Br. 15-17) that the liquidation of the Company did not enter into or effect the Company's tax situation for the period involved. It is the fact that liquidation took place and that it ended the taxable period at April 29, 1944, which raises the question of whether income is clearly reflected under the method used. The Commissioner, in the exercise of the broad discretion given him by Section 41 (See *William Hardy, Inc. v. Commissioner, supra*, p. 250, and cases there cited), has determined that in the light of that fact income is not clearly reflected if the liquidation's effect upon the method of reporting used is not taken into consideration. The taxpayer's position is tantamount to an insistence that that fact should be completely ignored without regard to the Commissioner's authority and duty under the applicable statute. That position is untenable.

The record here shows that the Company kept its books (R. 44) and rendered its income tax returns (R. 124) upon the accrual basis of accounting in the prior fiscal years (R. 45, 88, 115). It generally accrued expenses incident to the operation of its business (R. 61, 65, 121, 133) but storage charges collectible by it were not included in income until paid (R. 59, 65-66). By placing in gross income for the taxable period ended April 29, 1944, the storage charges of $37,225.96 which had actually accrued during that period, the Commissioner, far from repudiating the fundamental basis or method upon which the Company computed its income, merely applied that method, i.e., the accrual, to all items of income and expense. It is impossible for the taxpayer, especially in view

of the liquidation of the Company on April 29, 1944, to show that the Commissioner's determination did not clearly reflect income or that it was in any way erroneous.

As we have pointed out, the law is well settled that the method employed by the taxpayer is never conclusive, and that if, in the opinion of the Commissioner, it does not clearly reflect income he may compute income upon that basis and in that manner which will, in his opinion, do so. *Brown v. Helvering,* 291 U.S. 193, 203. Moreover, it is equally well settled that "Keeping accounts and making returns on the accrual basis, as distinguished from the cash basis, import that it is the *right* to receive and not the actual receipt which determines the inclusion of the amount in gross income. When the right to receive an amount becomes fixed, the right accrues." *Spring City Co. v. Commissioner,* 292 U.S. 182, 184-185. These rules are not altered by the fact that a completed-contract method of accounting is used by a taxpayer. *Jud Plumbing & Heating v. Commissioner, supra.*

We have found two cases which are directly in point in support of the action taken by the Commissioner in this case. One of them, *Franklin County Distilling Co. v. Commissioner,* 125 F. (2d) 800 (C.A. 6th), parallels this case and the other, *Jud Plumbing & Heating v. Commissioner,* 153 F. 2d 681 (C.A. 5th), is on all fours with it. In the *Franklin Distilling Co.* case, *supra,* the taxpayer, which kept its books and rendered its returns upon the accrual basis, sought to exclude from the sales price of whiskey sold in 1935 the amount of production taxes paid by it upon its manufacture, which taxes were reimbursable to it in contracts of sales made in that year. The taxpayer moreover sought refund of taxes paid on the

ground that storage charges accrued as income in 1935 should not have been so accrued because they were not collectible until the whiskey sold was withdrawn from storage.

In that case, with respect to the exclusions from 1935 sales prices, as in the instant case with respect to the accrual of storage charges, the taxpayer contended that its reporting was proper and should be sustained because (1) the reimbursement of production taxes it paid was not actually made to it in 1935; (2) the right to the receipt thereof was conditional; (3) the amount was unliquidated, being conditioned upon future events; and (4) that there was a reasonable probability that a large part of the amount would never be paid by the purchasers of the whiskey. The court, denying all of the contentions of the taxpayer, affirmed the decision of the Tax Court upholding the action of the Commissioner in including the reimbursable taxes in gross income for 1935.

In the course of its opinion in that case the court said (p. 803) that where income tax returns are made by the taxpayer on an accrual basis, there need not be certainty, but only reasonable accuracy, in calculating an amount to be received, in order to bring that amout within taxable income. It also said (p. 804) that whether a taxpayer is entitled to or bound to accrue an item of income in a certain year depends upon whether there was justification for a reasonable expectation that payment of the item would be made in due course. After citing the rule of *Spring City Co. v. Commissioner, supra,* from which the taxpayer here quotes (Br. 16), the court added (p. 804) that when accounts are kept on an accrual basis, income must be accounted for in the year in which realized, although not then actually received. Under-

scoring the words in Section 41 vesting broad discretion in the Commissioner, the court held (p. 804):

> Inasmuch as the accrual method of accounting adopted by the taxpayer was not "regularly employed," in that the accrued items of production tax payments passed along for assumption by purchasers of the whiskey sold during 1935 were not included in petitioner's income tax return, the Commissioner of Internal Revenue was clearly privileged to make his computation according to such method as in his opinion would clearly reflect the income. The petitioner has no legal basis for its opposition to such procedure.

In its decision the court dismissed the contention of the taxpayer that a refund of taxes paid was due because gross income had included storage charges which were not actually collectible in 1935 with the statement (p. 805) that there was no merit in the argument. Under the rule of *Spring City Co. v. Commissioner, supra; Brown v. Helvering, supra,* and other cases cited in its opinion, it held that the storage charge items clearly constituted income during 1935 and were properly included as such in the Commissioner's computation.

The court in that case reached its conclusions with full consideration of other cited cases, some of which are here relied upon by the taxpayer in the instant case, and it found no conflict with its views and the rule of those cases. It said specifically that there could be no quarrel with *H. Liebes & Co. v. Commissioner*, 90 F. 2d 932 (C.A. 9th), strongly relied upon by the taxpayer in the instant case (Br. 16-17), which laid down the rule that income accrues where there is an unconditional right to receive an amount and there is a reasonable expectancy of converting the right into money. In that connection, the court said (p. 805):

> The non sequitur in petitioner's argument flows from the fact that the record here discloses that petitioner has even more than a reasonable expectancy of converting its fixed right into money.

The same statement may be made in the instant case with respect to the storage charges, amounting at April 29, 1944, to more than $37,000. They were aggregated by the application of a fixed rate per month (R. 17, 81), so that the total at the end of any period was readily ascertainable, and there was "more than a reasonable expectancy of converting" the right to collect those charges into money, especially since it was a contract with the Government for the temporary storage of commodities needed in its then effort to win a war. This fact points up even more that when the Company here was liquidated and filed its return for the period ended April 29, 1944, it was not, in the same manner and extent as the taxpayer in the *Franklin Distilling Co.* case, *supra,* p. 804, following a method of reporting income "regularly employed" by it for it reported *no* income on account of the storage charges it had a right to receive.

The case of *Jud Plumbing & Heating v. Commissioner, supra,* as has been said, is on all fours with the instant case. It was decided against the taxpayer on facts almost identical to those in this case. There a taxpayer on a "completed contract" basis of accounting and reporting income, which in prior years had been satisfactory to the Commissioner of Internal Revenue, was dissolved in 1941 and its assets were transferred to its principal stockholder who continued and completed without interruption contracts which had been begun before its dissolution. That is the exact factual situation in the instant case. In that case none of the profits on the contracts completed

subsequent to dissolution were reported as income of the corporation on the ground that under the method of reporting used by it and approved by the Commissioner the corporation was not required to include unrealized and undetermined profits because it had received no profits and had no income to report at dissolution.

In deciding the case, upholding the inclusion by the Commissioner of over $32,000 as the corporation's income for 1941 which had accrued to it out of contracts commenced before dissolution, the amount being computed on a percentage basis, rather than, as in the instant case, at a specified monthly rate, the court pointed out (p. 683) that the Commissioner did not reject the completed-contract method of accounting which had previously been followed by the corporation. It said, as effectively it may be said in the instant case, that under the facts in the case, that method of accounting did not reflect the income of the corporation up to the date of its dissolution. There, as here, the action of the Commissioner was taken under Section 41 of the Internal Revenue Code.

The court in that case said (p. 683) that the question before it was whether, under the completed-contract method of accounting, the corporation was liable for taxes on income, earned during the year of its dissolution, on long-term contracts entered into by it but completed by its successor after its dissolution and whether the Commissioner used an erroneous method under Section 41 of the Internal Revenue Code in allocating income for the year of dissolution between the corporation and its successor. That, it may be said, is the statement of the question in the instant case. Here, if the $37,225.96 item in controversy is not taxed to the Company during the period

ended April 29, 1944, it goes untaxed altogether. Surely such a result would not clearly reflect the Company's income.

The whole of the opinion in the *Jud Plumbing* case, *supra,* is apt in the instant case but there are particular statements which read as if said in conjunction with this case. These are that a corporation, by a transfer of all of its assets and liabilities, cannot absolve itself from liability for income taxes due to the United States (p. 684) and that a corporation being a legal entity, its net earnings, whether ascertained or not, belong to it, and the tax upon unexempt income in each taxable year is chargeable to it (p. 684). The court added that that liability cannot be discharged by the simple expedient of dissolution, even though the corporation receives no money consideration in that act. It also said (p. 684):

> A taxpayer has the option of reporting his income on either a cash, accrual, or completion-of-contract basis if the method selected clearly reflects his income. But where a corporation: (a) carries on a business for two-thirds of the taxable year; (b) thereupon dissolves; (c) assigns and transfers all of its assets and liabilities to its chief stockholder; and (d) makes no return of its income; an annual return made by the corporation's chief stockholder and his wife, on the community basis, wherein they charge themselves with the net profits that they and the Corporation had earned during the tax year, could not be said to be a method of accounting as would clearly reflect income of the Corporation.

The court went on to point out (p. 685) that if the corporation's income was not returned in a manner which would clearly reflect its income, the return need not be accepted by the Commissioner, regardless of the method of accounting used, and that the

Commissioner has definite statutory authority under Sections 41 and 42 of the Internal Revenue Code, *supra,* not only to reject the method but to require the use of a method which does clearly reflect income. It added that a corporation (p. 685)—

> cannot avoid taxes by the simple expedient of not completing its contracts; and where a corporation puts itself in such position that it could never complete its contracts, it is in no position to insist that even if it had income it has no tax liability, or that its tax liability can be measured only by completed contracts.

We submit that it is perfectly clear, according to the facts in the instant case, that the Washington Fruit and Produce Company cannot escape its liability for taxes upon the storage charges earned by it, under the Government storage contract, or otherwise, prior to its dissolution, and that the taxpayer here and his associate stockholders are liable as transferees for the satisfaction of that tax liability. Here, as in the *Jud Plumbing* case, *supra,* the Company, through its very stockholders who now contest its liability, put itself in a position where it could never complete its contracts and it, too, is in no position to insist that it thus had no income and tax liability arising therefrom. On the same basis and grounds upon which the cases of *Franklin County Distilling Co. v. Commissioner,* 125 F. (2d) 800 (C.A. 6th), and *Jud Plumbing & Heating v. Commissioner,* 153 F. (2d) 681 (C.A. 5th), were decided against the taxpayer, we submit that the decision of the court below on the accrual of income issue in the instant case should be affirmed. See also, *Shelley v. Commissioner,* 2 T. C. 62; *Carter v. Commissioner,* 9 T. C. 364, affirmed on another issue, 170 F. 2d 911 (C.A. 2nd), and *Standard Paving Co. v. Commissioner,* 13 T. C. 425.

This position does no violence to the rule of this Court in *H. Liebes & Co. v. Commissioner,* 90 F. 2d 932. There it was said, as pointed out above, that income must be accrued, whether received or not, if there is a fixed or unconditional right to receive it and a reasonable expectancy that the right will be converted into money or its equivalent. That rule in fact comports with the cases upon which we rely and it compels the conclusion we urge because in the instant case, at the date of dissolution, all the events establishing the storage charges as income of the Company had taken place. The specified number of months at which the Government's goods were stored at a specified rate under a contract were ended and that created a fixed and unconditional right in the Company to recover a readily computable amount of money. The conversion of that certain right into money or its equivalent seems beyond question despite the fact that the goods had not then been removed from the Company's warehouse. The record here does not show whether any demand was made by the Company for the storage charge up to the date of dissolution, but whether or not such demands were made the Company had the same or equally as good reasons at that time for believing it had "reasonable expectancy" that the conversion into money would be made by the Government as did the taxpayer in the case of *H. Liebes & Co., supra,* that his court judgment would be converted into money.

Here, as in the *Franklin Distilling Co.* case, *supra,* as we have said, the Company had even more than a reasonable expectancy of converting its fixed right into money.

CONCLUSION

On the basis of the foregoing, we submit that the decision of the District Court on the storage charges accrual issue should be affirmed.

Respectfully submitted,

THERON LAMAR CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,
ROBERT N. ANDERSON,
HOWARD P. LOCKE,
Special Assistants to the Attorney General.

HARVEY ERICKSON,
United States Attorney.

FRANK R. FREEMAN,
Assistant United States Attorney.

May, 1951.

No. 12,814

IN THE

United States
Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant*

v.

P. J. LYNCH, *Appellee*

P. J. LYNCH, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

REPLY BRIEF FOR P. J. LYNCH

VELIKANJE & VELIKANJE
E. F. VELIKANJE
S. P. VELIKANJE
JOHN S. MOORE, JR.
Attorneys for Appellee-Appellant

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UNITED STATES OF AMERICA, *Appellee*

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

REPLY BRIEF FOR P. J. LYNCH

The questions presented to the Court having been heretofore clarified in the prior briefs, as well as the statutes and regulations involved, this brief will serve only to make answer to the fact situation and argument as set forth in the reply brief of the United States.

STATEMENT

With reference to the facts as outlined in the reply brief of the United States, it is felt that some reference should be made to the Statement regarding the potential spoilage and loss of products being stored. It should be

noted that although the Company did attempt to obtain adequate insurance coverage, such was not possible in excess of 30% to 50% of the valuation of the goods stored (R. 42). There was, therefore, actual danger of loss by the Company in the event of product loss.

The United States makes its claim that the Company kept books and rendered income tax returns upon the accrual basis except that storage charges "collectible" were not included until paid. A reading of the transcript shows that various items were kept on the accrual basis; others were kept on the deferred charge basis, and storage accounts were, as stated, only placed on the books at the termination of the storage period for any individual block of fruit or goods (R. 40). The use of the word "collectible" throughout the reply brief of the United States further emphasizes the difficulties encountered at trial. It was and is taxpayer's claim, which cannot avoided, that none of the storage accounts were ever collectible until the fruit or other goods had been removed from the warehouse in satisfactory condition. This is of extreme importance when considered with the applicable law as to when the right to receive income becomes fixed.

Again, the United States recites that the method of handling storage accounts did not preclude correct reflection of income because most of the stored goods had left the warehouse by the end of the fiscal year (Br. 5). It should be noted that this would normally be true as to fruit, but was not true as to the goods being stored under

government contract. As to both the fruit and the government products stored at the Company's warehouse, there was a binding agreement that regardless of the method of computing storage charges, no credit arose to the Company unless and until satisfactory removal (Exh. 4). The storage accounts as of April 29, 1944 were computed to be worth $37,225.96 if all of the storage were removed on that day. However, this was not all government products, but included also fruit being stored.

ARGUMENT

RIGHT OF THE COMMISSIONER TO REQUIRE A DIFFERENT METHOD OF ACCOUNTING

As set forth in taxpayer's initial brief, it is admitted that the Commissioner may require a different method of accounting where the method used by the taxpayer does not clearly reflect income. It appears from the brief of the United States that its contention as to this point is that there must not necessarily be a valid reason for the Commissioner's requirement that the method be changed (Br. 11). Upon the theory that storage accounts were kept on the accrual basis, the right to receive the accounts must first become fixed before the accounts become income. As has been previously shown, there was no right, to receive, fixed and established prior to corporate dissolution. Assuming that the method is a completed contract method, the Company would not be entitled to receive the accounts until the storage contracts had been completed. The sit-

uations are identical as far as the determination of income to the Company.

Much of the United States' brief is composed of a recitation of two cases, *Franklin County Distilling Co. v. Commissioner,* 125 F. 2d 800 (C. A. 6th), and *Jud Plumbing & Heating v. Commissioner,* 153 F. 2d 681 (C. A. 5th). It is claimed by the United States that these cases very closely parallel the instant case. It should be noted, however, that in the *Franklin County* case, *supra,* the corporation had not only accrued the storage accounts on its books, but had also included the same in the tax year involved in the income tax return without filing any claim for refund. The basis for the court's dismissal of the taxpayer company's claim as to the storage charges is clearly identified at the end of the court's opinion as being the election made by the company on which it must continue to stand.

The other question in the *Franklin County* case regarding the state production tax included as a production cost for the tax year, but omitted from the sales price, is of no effect or weight in determining the instant case. The corporation's claim was that the tax, although ultimately to be paid by the holder of the warehouse receipts, would not be collected, by agreement, until the goods were removed from storage. The court, in denying the corporation's claim, clearly indicated that the basis for the denial was the fact that if part of the elements of a sales price are accrued, then all elements of the sales price should be accrued. The tax involved was included in the sales

price of the whiskey, and the Commissioner correctly held, as did the court, that a sales price cannot be segregated by accruing one part thereof and postponing the other to some future date.

General statements of the law in the *Franklin County* case are, of course, correct, but the decision itself adds nothing to the question involved herein.

As to the *Jud Plumbing* case, *supra,* the United States claims that the case is on all fours with the instant case (Br. 11, 14). In that case, of course, the stockholder holding nearly all corporate stock took over all assets and liabilities of the corporation after dissolution, and in doing so, completed certain contracts. These contracts were reported as income by the stockholder as an individual when completed. The Commissioner determined the total cost of the contracts, determined the total profits of the contracts, and then computed, on a percentage basis, the profits up to dissolution date by comparing them with the costs to dissolution date. The court there upheld the Commissioner's ruling, as recited by the United States in its brief. However, there is one point of extreme importance in the *Jud Plumbing* case which completely voids its weight in the instant case. In the *Jud Plumbing* case the corporation, prior to dissolution, not only had the right to receive under its contracts, but had actually received, progress payments on the contracts as the work was being completed. This fact alone shows that the general rule regarding the fixing of the right to receive income had been

satisfied prior to the date of dissolution, and it further emphasizes the absence of such a situation in the instant case.

The United States also seeks to hold (Br. 17) that the corporation is here attempting to obtain a status of no tax liability upon income which should be reported by the corporation as a result of definite action taken by the corporation. The answer to this claim is that the corporation did not have income, and also, the individual stockholders paid a tax on the valuation of these accounts as a capital gain under the liquidation.

We believe that the rule and the decision in *H. Liebes & Co. v. Commissioner,* 90 F. 2d 932, should be given the utmost consideration, and we further believe that although the rules of the *Franklin County* case and the *Jud Plumbing* case, *supra,* constitute the law, the cases are distinguishable on the facts.

CONCLUSION

It is submitted that the decision of the District Court on the storage charges accrual issue should be reversed.

Respectfully submitted,

VELIKANJE & VELIKANJE
E. F. VELIKANJE
S. P. VELIKANJE
JOHN S. MOORE, JR.
Attorneys for Appellee-Appellant

No. 12,814

IN THE

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UNITED STATES OF AMERICA, *Appellant*

v.

P. J. LYNCH, *Appellee*

P. J. LYNCH, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

PETITION FOR REHEARING

VELIKANJE & VELIKANJE
E. F. VELIKANJE
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UNITED STATES OF AMERICA, *Appellee*

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

PETITION FOR REHEARING

Comes now Appellee - Appellant, P. J. Lynch, and petitions the above-entitled Court under Rule 25 of *Federal Rules of Civil Procedure* for a rehearing of said action for the reason that the decision heretofore filed on the 23rd day of November, 1951, is contrary to law. This petition is restricted solely to that portion of the Court's decision relating to the dividend in kind whereby the Court reversed the judgment against the United States of America.

FINDINGS OF FACT

(a) In General

It is submitted that this Court has disregarded the findings of fact made by the lower Court contrary to the general rules relating to the function of an appellate court. In this particular case, the District Court made a finding of fact (Finding of Fact 6, Tr. 13) that "the dividend in kind was a true dividend taxable as income to the stockholders, including plaintiff." The function of the District Court is similar to that of an administrative tribunal, although admittedly there is a distinction between findings made by an administrative tribunal and a district court. In *Commissioner of Internal Revenue v. Court Holding Co.*, 324 U. S. 331, 89 L. Ed. 981, 65 S. Ct. 707, the Court, in discussing a finding made by the Tax Court, which was subsequently denied by the Circuit Court of Appeals, stated:

> "There was evidence to support the findings of the Tax Court and its findings must therefore be accepted by the courts. *Dobson v. Commissioner of Internal Revenue*, 320 U. S. 489, 88 L. Ed. 248, 64 S. Ct. 239; *Commissioner of Internal Revenue v. Heininger*, 320 U. S. 467, 88 L. Ed. 171, 64 S. Ct. 249; *Commissioner of Internal Revenue v. Scottish American Invest. Co.*, 323 U. S. 119, ante, 97, 65 S. Ct. 169."

In the Scottish American case, supra, the Tax Court made a finding that a particular office was not a sham, but was used for regular transaction of business thus making the taxpayers resident foreign corporations. The Circuit Court

denied this finding. Justice Murphy writes as follows in the decision:

> "The sole issue revolves about the propriety of the inferences and conclusions drawn from the evidence by the Tax Court. The taxpayers claim that these determinations are supported by substantial evidence and hence were not reversible by an appellate court. . . .
>
> "The answer is to be found in a proper realization of the distinctive functions of the Tax Court and the Circuit Courts of Appeal in this respect. The Tax Court has the primary function of finding the facts in tax disputes, weighing the evidence, and choosing from among conflicting factual inferences and conclusions those which it considers most reasonable. The Circuit Courts of Appeal have no power to change or add to those findings of fact or to reweigh the evidence. And when the Tax Court's factual inferences and conclusions are determinative of compliance with statutory requirements, the Appellate Courts are limited to a determination of whether they have any substantial basis in the evidence. . . If a substantial basis is lacking the Appellate Court may then indulge in making its own inferences and conclusions or it may remand the case to the Tax Court for further appropriate proceedings. But if such a basis is present the process of judicial review is at an end."

and at page 125:

> "We do not decide or imply that the contrary inferences and conclusions urged by the Commissioner are entirely unreasonable or completely unsupported by any probative evidence. We merely hold that such contentions are irrelevant so long as there is adequate support in the evidence for what the Tax Court has inferred. It follows that the Tax Court's conclusions in this case cannot be set aside on appellate review."

Although the rule is not as strict as to District Courts,

the determination of the binding effect of a finding is similar. Rule 52(A) of the *Federal Rules of Civil Procedure* recites as follows:

> "Findings of fact shall not be set aside unless clearly erroneous."

This rule has been interpreted in numerous cases to mean that the findings by the District Court are binding on appeal if the records offer an adequate basis for the conclusions and inferences drawn by the District Court, *(U. S. v. Cold Metal Process Company,* 164 F. 2d 754); and the Reviewing Court's power is limited to a determination of whether the inferences and conclusions of the trial judge in making findings of fact have any substantial basis in evidence, and if such basis is present, the findings of the Trial Court must be accepted. *Gaytime Frock Company v. Liberty Mutual Insurance Company,* 148 F. 2d 694. Even though different reasonable inferences may fairly be drawn from the evidence and even though the District Court might well have reached a different conclusion, the Appellate Court should not disturb the findings of the District Court unless they are clearly erroneous. *Tennessee Coal, Iron & R. Company v. Muscoda Local No. 123,* 137 F. 2d 176; *Bostian v. Levich,* 134 F. 2d 284. In determining whether the District Court's findings are "clearly erroneous," appellee must be given the benefit of all favorable inferences, which reasonably may be drawn from the evidence. *Cashman v. Mason,* 166 F. 2d 693. The findings of the District

Court, which are supported by evidence or which are based upon reasonable inferences drawn from evidence are not "clearly erroneous." *Gray, McFawn & Co. v. Hegarty Conroy & Co.*, 109 F. 2d 443; *Reynolds Metal Co. v. Skinner*, 166 F. 2d 66.

It is submitted that in the instant case the finding by the District Court that the dividend in kind was a true dividend has substantial basis in the evidence and that a view of all of the evidence from the standpoint most favorable to appellee-appellant of necessity indicates that the finding is not "clearly erroneous." For this reason, the finding should be binding upon this Court and the setting aside of that finding should be held in error.

(b) Specific Findings of This Court

It is further submitted that this Court has misunderstood the facts and that apparently, from the decision, such misunderstanding was considered important in the final determination. An example of this is shown on page 2 of the *Decision*, wherein it is stated that the property distributed by the corporation represented its inventory or stock in trade. This is completely wrong. The testimony shown at the trial was to the effect that the corporation normally handled the fruit owned by other persons by storing, preparing for market and marketing. The apples, which were involved in the dividend had been purchased by the corporation from other owners and although such practice did occur, this practice was not the normal method

of operation and did not represent the bulk of the company's business.

Secondly, the Court recites on page 3 of the *Decision:*

> "Distribution of corporate inventory with the expectation of the immediate sale by the shareholders pointedly suggests a transaction outside the range of normal commercially motivated and justifiable corporate activity."

An understanding of the apple industry and a reading of the transcript indicates that a sale within the immediate future was probable, due to the peculiarities of the apple industry. Admittedly, as compared with some years, a sale of the fruit involved in the dividend was not difficult, there being a good market. Such a condition exists today, whereas during the years 1949 to 1950 the condition was not present. However, the probable sale within the immediate future should not be used as an excuse to deny the validity of the dividend. (See *Ripy Brothers Distilleries, Inc. v. Commissioner of Internal Revenue,* 11 T. C. 326, as set forth in Appellee-Appellant brief).

THE LAW

On page 3 of the *Decision,* the Court states:

> "Under these circumstances, we fail to see a motive for the dividend other than to escape taxation."

Thereafter the Court makes use of *Commissioner v. Transport Trading and Terminal Corporation,* 176 F. 2d 570, to sustain the theory that the presence of such a motive denies

the validity of the dividend. The key and most important case upon this point is *Gregory v. Helvering,* 293 U. S. 465, 79 L. Ed. 596. It is submitted that the Court has disregarded the Gregory decision and the correct approach to this problem. In the Gregory case, the question arose as to whether a reorganization had been accomplished from the tax standpoint. At page 468 the Supreme Court, through Mr. Justice Sutherland, states:

> "It is earnestly contended on behalf of the taxpayer that since every element required by the foregoing subdivision (B) is to be found in what was done, a statutory reorganization was effected; and that the motive of the taxpayer thereby to escape payment of a tax will not alter the result or make unlawful what the statute allows. It is quite true that if a reorganization in reality was effected within the meaning of subdivision (B) the ulterior purpose mentioned will be disregarded. The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes or altogether avoid them, by means which the law permits, cannot be doubted."

The Court then says that the question to be determined is whether a reorganization actually occurred. The distinction drawn by the Court is found in its statement as to what occurred:

> "Simply an operation having no business or corporate purpose—a mere device which put on the form of a corporate reorganization as a disguise for concealing its real character and the sole object and accomplishment of which was the consummation of a preconceived plan, not to reorganize a business or any part of a business, but to transfer a parcel of corporate shares to the petitioner. No doubt, a new and valid corpora-

> tion was created. But that corporation was nothing more than a contrivance to the end last described. It was brought into existence for no other purpose; it performed, as it was intended from the beginning it should perform, no other function. When that limited function had been exercised it immediately was put to death."

Applying this to the instant case, we find that the motive to escape or reduce taxes is proper and may be disregarded in determining whether the dividend was in truth a dividend. The sole determination is whether the dividend as declared and accomplished had a proper business motive. The normal business motive in the declaration of the dividend is the transferal of corporate assets to stockholders in the proportion of their holdings to provide such stockholders a return on their investments from corporate earnings. This was accomplished in the instant case by the transferring to the stockholders, apples which had been purchased by the corporation from its earnings. *The mere fact that income taxes were materially reduced by the use of this procedure and the fact that such was contemplated in the declaration of the dividend is immaterial.* As stated in *U. S. v. Cumberland P. S. Company*, 338 U. S. 451, 94 L. Ed. 251:

> "While the distinction between sales by a corporation as compared with distribution in kind followed by shareholder sales may be particularly shadowy and artificial when the corporation is closely held, Congress has chosen to recognize such a distinction for tax purposes."

and later in the same opinion:

> "The oddities in tax consequences that emerge from the tax provisions here controlling appear to be inherent in the present tax pattern. For a corporation is taxed if it sells all its physical properties and distributes the cash proceeds as liquidating dividends, yet is not taxed if that property is distributed in kind and is then sold by the shareholders. In both instances, the interest of the shareholders in the business has been transferred to the purchaser. . . .
>
> "Congress having determined that different tax consequences shall flow from different methods, by which the shareholders of a closely held corporation may dispose of corporate property, we accept its mandate. It is for the trial court upon consideration of an entire transaction to determine the factual category in which a particular transaction belongs."

It is submitted that the Gregory decision, supra, and the Cumberland decision, supra, contain the proper rules applicable to the instant case and fully demonstrate that the Trial Court was correct in making its findings that the dividend in kind was a true dividend.

The Court on page 2 of its *Decisions* states that the Trial Courts finding was clearly erroneous because the dividend was not and was not intended to be a liquidating dividend. Appellee - Appellant presents the Ripy case, supra, as one of the most recent and well considered decisions sustaining the view that a dividend in kind is proper in a going concern without the tax consequences to the corporation, which this Court has ruled. *There is no rule of law that a dividend in kind, to be a true dividend from*

the tax standpoint, has to be a liquidating dividend and Appellee-Appellant submits that such does not make the lower Court's finding clearly erroneous.

CONCLUSION

It is respectfully submitted to the Court that:

1. The finding of the Trial Court that the dividend in kind was a true dividend, was supported by the evidence and thus not clearly erroneous.

2. The doctrine of the Gregory case has not been correctly applied in the Transport Trading case nor in the instant case.

3. The motive of decreasing taxation is a valid one and does not make taxable that which is not.

4. Appellee-Appellant Lynch should be granted a rehearing, and upon such hearing the former decision of this Court should be set aside as to the dividend in kind issue, and the decision of the Trial Court should be affirmed.

Respectfully submitted,

VELIKANJE & VELIKANJE
E. F. VELIKANJE
S. P. VELIKANJE
JOHN S. MOORE, JR.

Attorneys for Appellee-Appellant and Petitioner.

No. 12818

United States
Court of Appeals
for the Ninth Circuit.

SETH J. A. WELDON and DOROTHY WELDON,

Appellants.

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court, Southern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12818

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SETH J. A. WELDON and DOROTHY WELDON,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

In the United States District Court in and for the Southern District of California, Southern Division

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SETH J. A. WELDON,

Defendant.

NOTICE OF MOTION

To the United States Attorney:

Please Take Notice that said Seth J. A. Weldon, as petitioner, will move the above-entitled Court, at its Courtroom, in San Diego, California, on Monday, October 23, 1950, at 10:00 a.m., to suppress $900.00 in currency, one cigarette case, two bills of sale, $28.51, of which $28.00 is in currency and 51c in small change, one index card, as evidence in any and all criminal proceedings now pending or hereafter instituted in the above-entitled Court or before the Grand Jury, and that said sum of $900.00 in currency, said cigarette case, and said two bills of sale be returned to Dorothy Weldon, and that said sums of money aggregating $28.51 and said index card be returned to petitioner, Seth J. A. Weldon, upon the ground that said property was illegally seized, without a search warrant, in violation of the Fourth Amendment and the authorities listed in the accompanying Points and Authorities, and that there was no probable cause for the [2] issuance of a search warrant.

Said motion will be based upon the accompanying Affidavits of Seth J. A. Weldon and Dorothy Weldon, pursuant to said authorities listed in said Points and Authorities accompanying this Notice.

Dated: October 17, 1950.

/s/ CLARENCE HARDEN,
Attorney for Said Seth J. A. Weldon, Petitioner.

[Endorsed]: Filed October 17, 1950. [3]

[Title of District Court and Cause.]

MOTION FOR SUPPRESSION OF EVIDENCE AND RETURN OF SEIZED PROPERTY

Seth J. A. Weldon, petitioner, hereby moves the above-entitled Court to direct that certain property, to wit: $900.00 in currency, one cigarette case, two bills of sale, $28.51, of which $28.00 is in currency and 51c in small change, one index card, be suppressed as evidence in any and all criminal proceedings now pending or hereafter instituted, before this court or before the Grand Jury, and that said sum of $900.00 in currency, said cigarette case and said two bills of sale be returned to Dorothy Weldon, and that said sums of money aggregating $28.51 and said index card be returned to petitioner, Seth J. A. Weldon, and all of which property was on July 14, 1950, in the City of San Diego, County

of San Diego, State of California, in the Southern Division of the Southern District of California, illegally seized and taken from the possession of petitioner and from the possession of his wife, Dorothy Weldon, by four officers of the F.B.I. of the United States, upon the [4] following grounds:

(1) All of said property was illegally seized and taken from the possession of petitioner and of his wife without any search warrant, without their consent, and against their will;

(2) There was no probable cause for the issuance of any search warrant for said seizure or for the taking of any of said property, all of which appears in the accompanying Affidavits of Seth J. A. Weldon and Dorothy Weldon, to which reference is made for further particulars.

Dated: October 17, 1950.

/s/ CLARENCE HARDEN,
Attorney for Petitioner.

Duly verified.

[Endorsed]: Filed October 17, 1950. [5]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE AND FOR RETURN OF SEIZED PROPERTY.

State of California,
County of San Diego—ss.

I, Seth J. A. Weldon, depose and say: On July 14, 1950, at about 6:00 a.m., four officers, who it developed were F.B.I. agents, came to the apartment of myself and wife at 3040½ Adams Avenue, San Diego, California, entered the same, and made a thorough search of the property. At the time they stated they had a warrant for my arrest but that they had no search warrant authorizing them to search the premises. However, they asserted that, incidental to my arrest, they had the right to search the premises.

I know of my own knowledge that one of said officers took from my wife's dresser drawer, among her clothing, a cigarette case containing three $100.00 bills and twelve $50.00 bills, a total of $900.00, the property of my wife, acquired, as I verily believe, under the circumstances set forth in her accompanying affidavit, which I have read and believe to be true. [8]

At that time two bills of sale, the property of Anita Prince and Paul S. Prince, were also taken from the possession of my wife.

All of said property was taken against the will and without the consent of my wife and without my consent.

On said occasion, while in the process of searching said premises, one of said men took from my wallet which was on top of a chest of drawers in the bedroom, the sum of $28.00 in currency, and also took from the top of the chest of drawers 51c in small change, all of which was my property. At said time said officers also took from the service porch of said premises an index card, about 3 x 5 in. ruled on one side, in the handwriting of my wife, which was my property. Said property was taken without my consent and against my will.

I am informed and believe, and on such information and belief allege that said officers still have in their possession said sum of $900.00 in currency and said cigarette case, the property of my wife, said bills of sale which were in the lawful custody of my wife, and said sum of $28.51 and said index card, my property.

/s/ SETH J. A. WELDON.

Subscribed and sworn to before me this 17th day of October, 1950.

[Seal] /s/ SENA W. TITGENS,
Notary Public in and for the County of San Diego, State of California.

[Endorsed]: Filed October 17, 1950. [9]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE AND FOR RETURN OF SEIZED PROPERTY

State of California,
County of San Diego—ss.

I, Dorothy Weldon, depose and say: I married Seth J. A. Weldon in Chicago, Illinois, December 31, 1946, and ever since we have been and now are husband and wife.

On the morning of July 14, 1950, at about 6:00 a.m., four men, who it afterward developed were F.B.I. agents, came to the apartment of my husband, Seth J. A. Weldon, and myself, at 3040½ Adams Avenue, San Diego, rang the doorbell, and after my opening the door, came into my apartment. By said ringing, I was awaked from a sound sleep and went to the door in my nightgown. I purposely omit to give the details of their intrusion into my bedroom and apartment for the reason that I think those matters are probably immaterial at this time.

Later on, and within a few minutes of their arrival as aforesaid, two of said men, whose names are unknown to me, in the absence of my husband and the other two officers who were in the bedroom, came [10] into my livingroom, and one taking one side of the room and the other the opposite, they went through every drawer, every box, opened every piece of linen, turned over chairs and tables, looked under the rugs, took the panels out of the piano

and searched the piano, looked into the radio and phonograph, looked into my personal correspondence box, opened every envelope, personal letters, and otherwise, looked in vases, books and magazines, and then had me move off the couch to check the cushions and inner linings. While they were searching, one of the men left the room and went out into the back yard. At that time the sum of $900.00 in the form of three $100.00 bills and twelve $50.00 bills was in my cigarette case in my bureau drawer among my clothing in the bedroom. When he came back he said that they had found $900.00 and asked whose it was. They told me that Mr. Weldon said it was mine and started asking me questions for a definite Yes or No on community property and exactly when I put the money away and the amount of it. I told them I put it away at various times but the majority I got from Mr. Sussman. He asked when was the last time I took anything out, and I told him $100.00 when Seth had his teeth fixed. They continued with a lot of questions and I accused them of putting words in my mouth. This stopped the questioning and they continued with the search on into the kitchen and service porch.

At the time said men came to my apartment at 6:00 a.m. on July 14, 1950, as aforesaid, on inquiry they stated that they had a warrant for the arrest of my husband, Seth J. A. Weldon. They were asked whether they had any search warrant authorizing them to search the premises, and they said they did not but asserted they had a right so to

search the premises incidental to the placing of my husband under arrest.

Said officers took said sum of $900.00 and said cigarette case from my possession without my consent and against my will; and it is [11] my belief that they still have said money and case. At said time said officers also took from my dresser drawer and from my possession a bill of sale for a 1948 Crosley pickup automobile made out to Anita Prince and also a bill of sale for furnishings made out to Paul S. Prince. Said documents were left in my possession by Mrs. Prince, when she and her husband moved, to be picked up later. Said papers are the property of Mrs. Prince but left in my possession for safekeeping until called for.

As aforesaid, I married Seth J. A. Weldon on December 31, 1946, in the State of Illinois. It is my belief that the laws of Illinois provide that the earnings of a wife are her property free from any interference or claim of the husband, and that the earnings of the husband are likewise privileged, except for ordinary support and maintenance of the wife.

Although my husband and I took residence in California (at San Diego) in November, 1947, we were agreed that we should continue to determine our property under the same terms as if we had continued to reside in the State of Illinois, and we have remained so agreed to date, and intend to remain so agreed.

So that it cannot be said that the $900.00 in my

possession was obtained by any illegal transfer from my husband, I recite the following facts:

On October 8, 1946, I was possessed of more than $2100.00 in cash and had a balance of $12.27 in a checking account. On that date, I purchased 150 shares of capital stock of Associated Models, Inc., from one Melvin S. Sussman, who insisted on cash that date. Accordingly, I wrote a check to Associated Models, Inc., for $2000.00 (the agreed price) which check Sussman endorsed, whereon I gave him the $2000.00 in exchange for the check. On October 9, 1946, I deposited the endorsed check and $50.00 in my checking account. On October 11, 1946, I deposited another $50.00. [12]

A few days later, being dissatisfied with the value of the stock I had purchased, I paid one David R. Landau, attorney, $50.00 and on October 20, 1946, he secured Sussman's agreement to repurchase the stock on October 25, 1946. Sussman did not live up to the agreement, and Landau appeared ineffective whereupon I hired Attorney Alexander H. Glick. Glick was to receive one-third of monies collected less the retainer of $150.00 which I paid him about November 1, 1946. Glick reduced the agreement to $300.00 cash which I received, and seventeen (17) notes of $100.00 each, dated December 1, 1946, payable at various times. Sussman eventually paid eight (8) of the notes, of which I received $600.00 and Glick $200.00. In other words, after paying out $200.00 in attorney's fees, I received $900.00.

In the meantime, about the middle of November,

I believe, I formed a corporation known as Ember Models, Inc., with Seth Weldon, then a friend, and another. I remained engaged in its interests until February 12, 1947. As I remember, I invested $400.00 and Seth $900.00. On February 12, 1947, he and I sold our stock at face value, realizing no profit or loss, and I received my $400.00 back.

In April or May, 1947, I went to work for Louis Supera and Supera-Malmstrom Property Management (a partnership), each of whom paid one-half my total salary of $45.00 a week, and worked till after Labor Day, 1947, and received therefrom gross salary of $650.44.

After arriving in San Diego, I worked a few days for the Long Agency and received $25.00 salary.

In the first part of 1948 I worked for Hooper-Holmes Bureau, Inc., San Diego, and received salary of $802.86.

In July, 1948, I became employed at Rockgas Service Co., Inc., San Diego, and remained a year, until July 3, 1949, for which I received a salary of $2012.37. [13]

About August 25, 1948, I began to draw unemployment checks of $25.00 a week for about a total of nineteen (19) weeks, or a sum total of about $475.00.

Early in 1949 I had begun the practice of helping my husband with the books of his business in the evening. At the time we were living in a tiny apartment which is part of the store building at 3038 Adams Avenue, San Diego (to be distinguished from the apartment at 3040½ Adams, which is

one-half of a building on the rear of the same lot). In fact, what was supposed to be our parlor doubled for an office in the daytime. After leaving the employ of Rockgas in July, 1949, I began to assume the duties of bookkeeper in my husband's business, known as Weldon's Modern Home Store. Outside of weekly efforts to find another position, I soon found I was spending my entire time in those and related duties.

In January, 1950, I relinguished my claim to unemployment compensation and took up full time employment in my husband's business on the basis of a $50.00 a week salary, and I remained so employed until the business was closed June 3, 1950.

/s/ DOROTHY P. WELDON.

Subscribed and sworn to before me this 16th day of October, 1950.

[Seal] /s/ SENA W. TITGENS,
Notary Public in and for Said County of San Diego, State of California.

Receipt of copy acknowledged.

[Endorsed]: Filed October 17, 1950. [14]

AFFIDAVIT OF WILBUR L. MARTINDALE

United States of America,
Southern District of California, Southern Division—ss.

Wilbur L. Martindale, being first duly sworn, deposes and says:

That he is now, and at all times herein mentioned was, a Special Agent of the Federal Bureau of Investigation with headquarters at San Diego.

That on July 14, 1950, accompanied by Special Agents Charles B. Flack, Jr., William J. Geiermann and Ivan D. Haack, he proceeded to the home of Seth J. A. Weldon for the purpose of executing a warrant for the arrest of Weldon, said warrant having been issued by United States Commissioner George R. Baird, San Diego, California, on July 13, 1950, on the basis of a complaint authorized by the United States Attorney and filed by affiant, alleging that on or about June 10, 1950, Weldon knowingly and fraudulently concealed assets from the creditors of his bankrupt estate in violation of Title 18, Section 152, United States Code.

That the four Agents mentioned above arrived at the Weldon home at approximately 6:14 a.m. July 14, 1950. Affiant knocked on the door and at this time Agent Flack was standing behind him; Agents Geiermann and Haack were on the sidewalk or in the yard and were not in the immediate vicinity of the door at this time. Dorothy Weldon opened the door and stood behind the door in such a manner that affiant only saw her face and shoulder. Affiant then stated to her that he was a Special Agent of the Federal Bureau of Investigation and that he held a warrant for the arrest of her husband. Dorothy Weldon informed affiant that her husband was in bed and that she was clad in her nightgown and requested an opportunity to put on

a robe. She was permitted to cross the living room and enter the kitchen before affiant and Agent Flack entered the living room where they paused to give her an opportunity to reach the bedroom. Affiant then proceeded to the kitchen and through the kitchen to the bedroom where he stood in the doorway connecting the bedroom with the kitchen. At this time Agent Flack was behind him and affiant's attention was concentrated on Weldon, who was arising from the bed which was in front of and to the right of the doorway. Affiant believes that Dorothy Weldon was at this time in a clothes [21] closet to the left of the doorway in which affiant was standing, as the next time affiant observed her she was standing by the closet door and was modestly dressed in a long robe.

Affiant informed Weldon that he was under arrest and Weldon then requested permission to telephone his attorney and both Mr. and Mrs. Weldon, affiant and Agent Flack proceeded to the living room where the telephone was located. Agent Geiermann and Haack were already in the living room, not having entered the bedroom. Weldon telephoned his attorney, E. C. Davis, and affiant handed him the warrant of arrest, which Weldon read to his attorney over the telephone, and also advised his attorney that the Agents had stated that they intended to search the house in connection with his arrest although they did not hold a search warrant.

Affiant then talked to Attorney Davis and stated that he believed that money was concealed in Weldon's home and that Weldon's home was to be searched incidental to the arrest and that Weldon

would be taken before the United States Commissioner for arraignment as soon as the Commissioner arrived at this office. Mr. Davis replied that his client had told him that there was no money in the house and that neither he nor his client objected to the search.

Affiant explained to Mr. and Mrs. Weldon that the search would be expedited if two agents searched the living room while the other two agents searched the bedroom. It was further explained that the agents did not wish to make any search unless either Mr. or Mrs. Weldon was present at all times and Mrs. Weldon was asked if she would mind remaining in the living room with Agents Geiermann and Haack while Weldon accompanied affiant and Agent Flack to the bedroom. Mrs. Weldon made no objection and the suggestion was carried out.

Before commencing the search affiant and Agent Flack requested Weldon to show them all of the money in the house. He produced the sum of $28.51 from his wallet and stated that there was no other money in the house.

Affiant and Agent Flack found a cigarette case in a dresser drawer in the bedroom. Inside this case was the sum of $900 in currency. When questioned as to the source and ownership of this money, Weldon stated that [22] he knew nothing about it and suggested that the agents ask his wife about it. Affiant left the bedroom and called Agent Haack from the living room to tell him of finding the $900.

After affiant returned to the bedroom, and in the presence of Agent Flack, Weldon was again asked

the source of the $900. He replied, "I have seen lots of money—you people know more about it than I do." Still later when asked about the ownership of the $900, Weldon related that Dorothy Weldon is his second wife and that she has money of her own and that he does not pry into her affairs. He further stated that he assumed that the money belonged to Dorothy Weldon. Weldon later told Agent Haack and affiant that he did not know the $900 was in the house and did not know whether or his wife had $900.

The search of the bedroom conducted by affiant and Agent Flack also revealed a bill of sale on the printed form of Nash San Diego, Inc., reflecting the sale of a Crosley automobile to Anita Prince on June 13, 1950. Weldon later stated that the Crosley automobile parked in front of his home was the automobile described in the bill of sale and that he was using the automobile. Subsequent to July 14, 1950, affiant has seen Weldon driving such an automobile on the streets of San Diego.

A 3 x 5 index card was seized by Agents Geiermann and Haack, on which were listed several postal money orders in the total amount of $500.00. Weldon has since told affiant that these money orders were sent to his mother on June 1, 1950, as repayment of a loan and that he did not list this repayment in his Statement of Affairs because he was embarrassed to have anyone learn that it was necessary for him to borrow money from his mother.

Toward the completion of the search, Weldon told affiant and Agent Flack that he had been

treated in a courteous manner during the search of his house and that he had no complaints to make regarding the conduct of the Agents in his home. Affiant, and the other Agents, conducted themselves in a courteous and gentlemanly manner at all times that they were in the Weldon home and during the time that they were in the presence of Mr. and Mrs. Weldon. Care was taken during the search not to cause disorder or damage. [23]

When leaving the Weldon home, and in the presence of Agent Geiermann, affiant expressed regret to Mrs. Weldon for the necessity of inconveniencing her. She graciously replied that she understood the necessity for the search and that she had not been inconvenienced. She did not at any time express any complaint regarding the conduct of any of the agents.

At no time did either Weldon or Mrs. Weldon express any objection to the search or seizure. After his arraignment and release on July 14, 1950, Weldon asked affiant what action would have been taken if he had objected to or refused to permit the search, affiant replied that inasmuch as the search was legally conducted incidental to Weldon's arrest, such search would have been carried out despite any objections.

Subscribed and sworn to before me this 23rd day of October, 1950.

[Seal] /s/ EDMUND L. SMITH,
Clerk.

By /s/ J. M. HORN,
Deputy Clerk. [24]

AFFIDAVIT OF WILLIAM J. GEIERMANN

United States of America,
Southern District of California,
Southern Division—ss.

William J. Geiermann, being first duly sworn, deposes and says:

That he is now, and at all times herein mentioned was, a Special Agent of the Federal Bureau of Investigation with headquarters in San Diego.

That on July 14, 1950, affiant accompanied by Special Agents Charles B. Flack, Jr., Ivan D. Haack and Wilbur L. Martindale proceeded to the home of Seth J. A. Weldon, 3040½ Adams Avenue, San Diego, California, for the purpose of executing a warrant for the arrest of Weldon.

That the four Agents mentioned above arrived at the Weldon home at approximately 6:14 a.m. on July 14, 1950. Agent Martindale, followed by Agent Flack, aproached the door while Agent Haack and the affiant remained in a position where they could watch the back door and were not in the immediate vicinity of the front door at that time. Approximately two minutes after Agents Martindale and Flack entered the Weldon home, Agent Haack and affiant entered the house through the front door and remained in the living room. Immediately after Agent Haack and affiant entered the house Weldon, Mrs. Weldon, Agent Flack and Agent Martindale entered the living room from the kitchen and Agent Haack and affiant were introduced to Mr. and Mrs. Weldon as Special Agents of the Federal Bureau of Investigation. At this time, and at all times

while affiant was in the presence of Mrs. Weldon, she was modestly clad in a long robe. Affiant did not at any time enter Mrs. Weldon's bedroom.

Upon entering the living room Weldon telephoned his attorney, and Agent Martindale handed Weldon the warrant of arrest, which Weldon read to his attorney over the telephone. Weldon also advised his attorney that the Agents had stated that they intended to search his house in connection with his arrest although they did not hold a search warrant.

Agent Martindale then took the telephone and stated that he believed that there was money concealed in Weldon's home, and the Weldon's home was to be searched incidental to the arrest, and that Weldon would be taken [25] before the United States Commissioner for arrangnment as soon as the Commissioner arrived at his office.

Upon completion of the telephone conversation Agent Martindale explained to Mr. and Mrs. Weldon that the search would be expedited if two Agents searched the living room, while the other two Agents searched the bedroom. Agent Martindale also said that the Agents did not wish to make any search unless either Mr. or Mrs. Weldon was present at all times, and Mrs. Weldon was asked if she would mind remaining in the living room with Agent Haack and affiant, while Weldon accompanied Agents Martindale and Flack to the bedroom. Mrs. Weldon made no objection, and the suggestion was carried out.

In answer to a question by Agent Haack, Mrs. Weldon related that about one week before she

had brought a $50.00 bill from her bedroom, which was used in a financial transaction with one Leslie Voght. Mrs. Weldon stated that the $50.00 bill was her money, but that it was the only $50.00 bill she had.

Mrs. Weldon told Agent Haack in the presence of affiant that at the time of her marriage to Weldon she did not have any money and did not even have proper clothes.

Before starting the search, Agent Haack, in the presence of affiant, asked Mrs. Weldon if there was any money in the house. Mrs. Weldon replied that to her knowledge there was no money in the house, with the exception of a small amount of money in her wallet and a small amount of money in her husband's wallet. Agent Haack and affiant carefully searched the living room, the kitchen and the service porch. The panels were not removed from the piano, although a thorough search was conducted and care was taken to leave the articles searched in an orderly manner and to avoid causing any damage.

In a drawer in a sewing machine on the service porch Agent Haack found a 3x5 index card, which Mrs. Weldon stated was a record of postal money orders totalling $500.00 which Weldon had mailed to his mother on June 1, 1950, as repayment of $600.00 borrowed from Weldon's mother in [26] 1947. Mrs. Weldon stated that $100.00 principal and $25.00 interest had been paid on this loan before June 1, 1950.

During the conduct of the search Agent Martindale called Agent Haack from the living room. Upon returning to the living room Agent Haack told Mrs. Weldon that a sizable amount of money had been found in the house. Agent Haack did not state any specific amount in this regard. Mrs. Weldon stated that she knew the money was in the house, and Agent Haack asked Mrs. Weldon who owned the money. Mrs. Weldon replied that should would rather have Agent Haack ask Weldon. Mrs. Weldon was asked by Agent Haack to state definitely whether or not the money belonged to Mrs. Weldon, and she was asked to state definitely whether or not the money belonged to Weldon. Mrs. Weldon refused to so state, but she did say that she was Weldon's wife, and that she had always considered "what is mine is his, and what is his is mine."

Mrs. Weldon then related a long, disconnected story as to how, before she was married, she invested $2,000 with one Melvin Sussman of Chicago, Illinois, and that she had received $2,000 from Sussman in promissory notes. Mrs. Weldon stated that $1,100 of these notes had been paid in $100.00 monthly installments, and that the last money paid by Sussman was received by Mrs. Weldon more than one year ago. Agent Haack asked Mrs. Weldon if the money found in the cigarette case was the same money which Mrs. Weldon obtained from Sussman, and Mrs. Weldon stated that she did not believe it was the same money, as she had taken money out and put money in periodically. At no time did Mrs. Weldon state that the money found

in the cigarette case belonged to her, although she was asked this specific question several times.

At no time did affiant or Agent Haack attempt to put words in Mrs. Weldon's mouth. Agent Haack did attempt to learn from Mrs. Weldon whether the money found in the cigarette case belonged to Mrs. Weldon, to Mr. Weldon or was their joint property. At no time did Mrs. Weldon accuse affiant or Agent Haack of putting words in her mouth.

When leaving the house Agent Martindale expressed regret to Mrs. Weldon for the necessity of inconveniencing her. Mrs. Weldon replied that [27] she understood the necessity for the search and that she had not been inconvenienced.

Affiant and the other Agents conducted themselves in a courteous and gentlemanly manner at all times that they were in the Weldon home, and at all times that they were in the presence of Mr. and Mrs. Weldon. At no time did either Weldon or Mrs. Weldon express any objection to the search or seizure, and at no time did either Mr. or Mrs. Weldon express any objection or complaint regarding the conduct of the Agents.

/s/ WILLIAM J. GEIERMANN.

Subscribed and sworn to before me this 24th day of October, 1950.

[Seal] /s/ EDMUND L. SMITH, Clerk.
By /s/ J. M. HORN,
Deputy Clerk. [28]

AFFIDAVIT OF IVAN D. HAACK

United States of America,
Southern District of California,
Southern Division—ss.

Ivan D. Haack, being first duly sworn, deposes and says:

That he is now, and at all times herein mentioned was, a Special Agent of the Federal Bureau of Investigation with headquarters in San Diego.

That on July 14, 1950, affiant accompanied by Special Agents Charles B. Flack, Jr., William J. Geiermann and Wilbur L. Martindale proceeded to the home of Seth J. A. Weldon, 3040½ Adams Avenue, San Diego, California, for the purpose of executing a warrant for the arrest of Weldon.

That the four Agents mentioned above arrived at the Weldon home at approximately 6:14 a.m. on July 14, 1950. Agent Martindale, followed by Agent Flack, approached the door while Agent Geiermann and the affiant remained in a position where they could watch the back door and were not in the immediate vicinity of the front door at that time. Approximately two minutes after Agents Martindale and Flack entered the Weldon home, Agents Geiermann and affiant entered the house through the front door and remained in the living room. Immediately after Agent Geiermann and affiant entered the house Weldon, Mrs. Weldon, Agent Flack and Agent Martindale entered the living room from the kitchen and Agent Geiermann and affiant were introduced to Mr. and Mrs. Weldon as Special

Agents of the Federal Bureau of Investigation. At this time, and at all times while affiant was in the presence of Mrs. Weldon, she was modestly clad in a long robe. Affiant did not at any time enter Mrs. Weldon's bedroom.

Upon entering the living room Weldon telephoned his attorney, and Agent Martindale handed Weldon the warrant of arrest, which Weldon read to his attorney over the telephone. Weldon also advised his attorney that the Agents had stated that they intended to search his house in connection with his arrest although they did not hold a search [29] warrant.

Agent Martindale then took the telephone and stated that he believed that there was money concealed in Weldon's home, and that Weldon's home was to be searched incidental to the arrest, and that Weldon would be taken before the United States Commissioner for arraignment as soon as the Commissioner arrived at his office.

Upon completion of the telephone conversation Agent Martindale explained to Mr. and Mrs. Weldon that the search would be expedited if two Agents searched the living room while the other two Agents searched the bedroom. Agent Martindale also said that the Agents did not wish to make any search unless either Mr. or Mrs. Weldon was present at all times, and Mrs. Weldon was asked if she would mind remaining in the living room with Agent Geiermann and affiant, while Weldon accompanied Agents Martindale and Flack to the bed-

room. Mrs. Weldon made no objection, and the suggestion was carried out.

In answer to a question by affiant, Mrs. Weldon related that about one week before she had brought a $50.00 bill from her bedroom, which was used in a financial transaction with one Leslie Voght. Mrs. Weldon stated that the $50.00 bill was her money, but that it was the only $50.00 she had.

Mrs. Weldon told affiant in the presence of Agent Geiermann that at the time of her marriage to Weldon she did not have any money and did not even have proper clothes.

Before starting the search, affiant, in the presence of Agent Geiermann, asked Mrs. Weldon if there was any money in the house. Mrs. Weldon replied that to her knowledge there was no money in the house, with the exception of a small amount of money in her wallet and a small amount of money in her husband's wallet. Agent Geiermann and affiant carefully searched the living room, the kitchen and the service porch. The panels were not removed from the piano, although a thorough search was conducted and care was taken to leave the articles searched in an orderly manner and to avoid causing any damage. [30]

In a drawer in a sewing machine on the service porch affiant found a 3x5 index card, which Mrs. Weldon stated was a record of postal money orders totalling $500.00 which Weldon had mailed to his mother on June 1, 1950, as repayment of $600.00 borrowed from Weldon's mother in 1947. Mrs. Weldon stated that $100.00 principal and $25.00 inter-

est had been paid on this loan before June 1, 1950.

During the conduct of the search Agent Martindale called affiant from the living room and told affiant that $900.00 in currency had been found in a cigarette case in the bedroom.

Upon returning to the living room affiant told Mrs. Weldon that a sizable amount of money had been found in the house. Affiant did not state any specific amount in this regard. Mrs. Weldon stated that she knew the money was in the house, and affiant asked Mrs. Weldon who owned the money. Mrs. Weldon replied that she would rather have affiant ask Weldon. Mrs. Weldon was asked to state definitely whether or not the money belonged to Mrs. Weldon, and she was asked to state definitely whether or not the money belonged to Weldon. Mrs. Weldon refused to so state, but she did say that she was Weldon's wife, and that she had always considered "what is mine is his, and what is his is mine."

Mrs. Weldon then related a long, disconnected story as to how, before she was married, she invested $2,000 with one Melvin Sussman of Chicago, Illinois, and that she had received $2,000 from Sussman in promissory notes. Mrs. Weldon stated that $1,100 of these notes had been paid in $100.00 monthly installments, and that the last money paid by Sussman was received by Mrs. Weldon more than one year ago. Affiant asked Mrs. Weldon if the money found in the cigarette case was the same money which Mrs. Weldon obtained from Sussman.

and Mrs. Weldon stated that she did not believe it was the same money, as she had taken money out and put money in periodically. At no time did Mrs. Weldon state that the money found in the cigarette case belonged to her, although she was asked this specific question several times. [31]

At no time did affiant or Agent Geiermann attempt to put words in Mrs. Weldon's mouth. Affiant did attempt to learn from Mrs. Weldon whether the money found in the cigarette case belonged to Mrs. Weldon, to Mr. Weldon or was their joint property. At no time did Mrs. Weldon accuse affiant of putting words in her mouth, and affiant stopped asking questions of Mrs. Weldon because she would not give direct answers.

After affiant left the house with Weldon and Agent Martindale, Weldon stated, in the presence of affiant and Agent Martindale, that he had not known the $900.00 was in the house, and that he did not know whether or not his wife had $900.00.

Affiant and the other Agents conducted themselves in a courteous and gentlemanly manner at all times that they were in the Weldon home, and at all times that they were in the presence of Mr. and Mrs. Weldon. At no time did either Weldon or Mrs. Weldon express any objection to the search or seizure, and at no time did either Mr. or Mrs.

Weldon express objection or complaint regarding the conduct of the Agents.

/s/ IVAN D. HAACK.

Subscribed and sworn to before me this 24th day of October, 1950.

EDMUND L. SMITH,
Clerk.

By /s/ J. M. HORN,
Deputy Clerk.

[Endorsed]: Filed October 25, 1949. [32]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF OPPOSITION TO MOTION FOR SUPPRESSION OF EVIDENCE AND RETURN OF SEIZED PROPERTY

Affidavit of Charles B. Flack, Jr.

United States of America,
Southern District of California,
Southern Division—ss.

Charles B. Flack, Jr., being first duly sworn, deposes and says:

That he is now, and at all times herein mentioned was, a Special Agent of the Federal Bureau of Investigation with headquarters at San Diego.

That on July 14, 1950, accompanied by Special Agents Wilbur L Martindale, William J. Geiermann and Ivan D. Haack, he proceeded to the home

of Seth J. A. Weldon for the purpose of executing a warrant for the arrest of Weldon.

That the four Agents mentioned above arrived at the Weldon home at approximately 6:15 a.m., July 14, 1950. Agent Martindale knocked on the door and at this time affiant was standing behind him; Agents Geiermann and Haack were on the sidewalk or in the yard and were not in the immediate vicinity of the door at this time. Dorothy Weldon opened the door and stood behind the door in such a manner that affiant only saw her face and shoulder. Agent Martindale then stated to her that he was a Special Agent of the Federal Bureau of Investigation and that he held a warrant for the arrest of her husband. Dorothy Weldon informed Agent Martindale that her husband was in bed and that she was clad in her nightgown and requested an opportunity to put on a robe. Mrs. Weldon disappeared from the front door and since affiant was standing behind Agent Martindale affiant was unable to see where Mrs. Weldon had gone, although the door was slightly ajar. A moment after Mrs. Weldon disappeared from the door Agent Martindale entered the house closely followed by affiant. Affiant did not see Mrs. Weldon at this time. Agent Martindale and affiant paused in the living room and then Agent Martindale led the way through the kitchen to the door connecting the kitchen with the bedroom where Agent Martindale paused in the doorway. Affiant stood behind Agent Martindale and saw Weldon arising from the bed which was in front of and to the right of the doorway. Mrs

Weldon was not in sight. Agent Martindale informed Weldon that he was under arrest and Agent Martindale and affiant entered the bedroom, at which time; affiant noticed that Mrs. Weldon was standing near the closet door to the left of the bedroom doorway. This was the first time that affiant had a full view of Mrs. Weldon or [38] was able to see how she was dressed. Mrs. Weldon was modestly clad in a long robe and wore this robe during the entire time that affiant was in the house.

Weldon then requested permission to telephone his attorney and both Mr. and Mrs. Weldon, Agent Martindale and Agent Flack proceeded to the living room where the telephone was located. Agents Geiermann and Haack were already in the living room, not having entered the bedroom. Weldon telephoned his attorney and Agent Martindale handed him the warrant of arrest, which Weldon read to his attorney over the telephone, and also advised his attorney that the Agents had stated that they intended to search the house in connection with his arrest although they did not hold a search warrant.

Agent Martindale then talked to the attorney but affiant did not hear this telephone conversation for the reason that his attention was concentrated on Weldon.

Agent Martindale explained to Mr. and Mrs. Weldon that the search would be expedited if two agents searched the living room while the other two agents searched the bedroom. It was further explained that the agents did not wish to make any search unless either Mr. or Mrs. Weldon was present

at all times and Mrs. Weldon was asked if she would mind remaining in the living room with Agents Geiermann and Haack while Weldon accompanied affiant and Agent Martindale to the bedroom. Mrs. Weldon made no objection and the suggestion was carried out.

Before commencing the search affiant and Agent Martindale requested Weldon to show them all the money in the house. He produced the sum of $28.51 from his wallet and stated that there was no other money in the house.

Affiant and Agent Martindale found a cigarette case in a dresser drawer in the bedroom. Inside this case was the sum of $900 in currency. When questioned as to the source and ownership of this money, Weldon stated that he knew nothing about it and suggested that the agents ask his wife about it. Agent Martindale left the bedroom.

Agent Martindale returned to the bedroom, and in the presence of affiant, Weldon was again asked the source of the $900. He replied, "I have seen lots of [39] money—You people know more about it than I do." Still later when asked about the ownership of the $900, Weldon related that Dorothy Weldon is his second wife and that she has money of her own and that he does not pry into her affairs. He further stated that he assumed that the money belonged to Dorothy Weldon.

The search of the bedroom conducted by affiant and Agent Martindale also revealed a bill of sale on the printed form of Nash San Diego, Inc., reflecting the sale of a Crosley automobile to Anita

Prince on June 13, 1950. Weldon later stated that the Crosley automobile parked in front of his home was the automobile described in the bill of sale and that he was using the automobile.

Toward the completion of the search, Weldon told affiant and Agent Martindale that he had been treated in a courteous manner during the search of his house and that he had no complaints to make regarding the conduct of the Agents in his home. Affiant, and the other Agents, conducted themselves in a courteous and gentlemanly manner at all times that they were in the Weldon home and during the time that they were in the presence of Mr. and Mrs. Weldon. Care was taken during the search not to cause disorder or damage.

At no time did either Weldon or Mrs. Weldon express any objection to the search or seizure.

/s/ CHARLES B. FLACK, JR.

Subscribed and sworn to before me this 26th day of October, 1950.

EDMUND L. SMITH,
Clerk.

By /s/ J. M. HORN,
Deputy Clerk.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 26, 1949. [40]

[Title of District Court and Cause.]

AFFIDAVIT OF SETH J. A. WELDON

State of California,
County of San Diego—ss.

Seth J. A. Weldon, being first duly sworn, deposes and says:

He is the petitioner herein. In reply to the statement made in the last paragraph of the Affidavit of Wilbur L. Martindale, as affiant recalls it, he asked Mr. Martindale what would have happened if he had physically objected to or had resisted the making of the search; and it was in reply to that question that Mr. Martindale made the statement that such search would have been carried out despite any objections.

Before the departure of said F. B. I. agents, they presented to affiant a form of receipt, which they requested him to sign, the original of which form of receipt affiant has in his possession and which is in words and figures as follows:

"San Diego, Calif.
"July 14, 1950.

"The following items were taken from the home of Seth J. A. Weldon on this date:

1 cigarette case found in a dresser drawer, said case containing: [42]

12 x $50 bills $600
3 x 100 bills 300

$900

and money contained in Welden's wallet as follows:

2 x $10	bills	$20		
1 x 5	bills	5		
3 x 1	bills	3		
1 x .25	coin	.25		
1 x .10	coin	.10		
3 x .05	coin	.15		
1 x .01	coin	.01		28.51
Total				$928.51

also taken was a bill of sale showing sale of household goods by Weldon to Paul S. Prince on May 23, 1950, and a motor car order dated June 13, 1950, showing sale of a car by Nash San Diego, due to Anita Prince.

W. L. MARTINDALE,
FBI, San Diego.

I certify that except for $4.00 in my wife's wallet, no other money was found and that except as listed in this receipt, nothing was taken from me."

Affiant refused to sign said receipt in the form it bears but affiant did inform said officers that if they would make two receipts, one for affiant's property, said sum of $28.51, and one for affiant's wife for said sum of $900.00, said parties would sign such receipts: Said officers made no reply to that suggestion.

As will be seen from said form of receipt the $900.00 consisted of twelve $50.00 bills and three $100.00 bills, as averred in the original affidavits of petitioner on file herein.

Affiant reiterates that neither he nor his wife consented to the making of said search; nor did they, or either of them, state, either in words or effect, that they had no objection to the making of the search. Said search was decidedly against the will and without the consent of both affiant and of his wife.

Two further circumstances should be stated as indicative of the fact that neither affiant nor his wife did consent to the making of such search.

As soon as Mr. Martindale entered affiant's bedroom and affiant raised himself from his bed, affiant found the necessity of relieving himself and going to the toilet for the purpose of urinating. This he did, and agent Martindale stood beside affiant while he was in the process of urinating in the toilet bowl, and said Martindale kept close watch of all actions and movements of affiant during that act, and he even observed affiant's private parts.

In addition to the search made of the property, as detailed in the original affidavits on file, in support of the motion to suppress and return evidence, said officers made a thorough search of the bathroom of said parties, opening and inspecting every article that was therein, including a box of Kotex, the property of affiant's wife. This box was opened, the contents emptied out, and thoroughly searched for hidden articles therein.

Affiant procured from the office of the United

States Commissioner in San Diego, California, a copy of the Complaint filed against affiant before said officer and a copy of the warrant of arrest issued thereon. A copy of said Complaint and a copy of said warrant are as follows:

"United States District Court for the Southern District of California Southern Division
"Commissioner's Docket No. 20

"Case No. 7101

"UNITED STATES OF AMERICA,
vs.

"SETH J. A. WELDON.

"COMPLAINT FOR VIOLATION OF U.S.C. TITLE 18 SECTION 152

"Before George R. Baird
"Name of Commissioner

"San Diego, California
"Address of Commissioner

"The undersigned complainant being duly sworn states:

"That on or about June 10, 1950, at San Diego in the Southern District of California, (name of accused) the above named defendant did knowingly and fraudulently conceal from the Creditors of the (here insert statement of the essential facts constituting the offense charged) bankrupt estate of Seth J. A. Weldon, doing business as Weldon's

Modern Home Stores, San Diego, California, property belonging to said bankrupt estate.

"And the complainant further states that he believes that.....are material witnesses in relation to this charge.

"WILBUR L. MARTINDALE,
"Signature of Complainant
"Special Agent, F.B.I.
"Official Title.

"Sworn to before me, and subscribed in my presence, 7-13-50.

"GEORGE R. BAIRD
"United States
Commissioner."

"District Court of the United States Southern District of California Southern Division
"Commissioner's Docket No. 20
"Case No. 7101

"UNITED STATES OF AMERICA,

vs.

"SETH J. A. WELDON.

"WARRANT OF ARREST

"To U. S. Marshal or any other Authorized Officer.

"You are hereby commanded to arrest (here insert name of defendant or description) Seth J. A. Weldon and bring him forthwith before the nearest available United States Commissioner to answer to a complaint charging him with concealing assets of a bankrupt estate from creditors (here describe

offense charged in complaint), in violation of U.S.C. Title 18, Section 152.

"/s/ GEORGE R. BAIRD,
"United States
Commissioner.
"1114 Bank of America
Bldg.
"San Diego 1, Calif.

"1. Here insert designation of officer to whom warrant is issued."

/s/ SETH J. WELDON,

Subscribed and sworn to before me this 30th day of October, 1950.

[Seal] /s/ SENA W. TITGENS,
Notary Public in and
For said county and state.

[Endorsed]: Filed November 10, 1950.

[Title of District Court and Cause]

AFFIDAVIT OF DOROTHY WELDON

State of California,
County of San Diego—ss.

I, Dorothy Weldon, depose and say: that about 6:00 a.m. on the morning of July 14, 1950, I was awakened by the ringing of the doorbell of my apartment at 3040½ Adams Avenue, San Diego, California, and half alseep jumped up and went to the front door. I opened it in such a way as to shield my body with the door and peered out. Mr. Mar-

tindale, who was previously known to me as an agent of the F. B. I, introduced himself and said "I have a warrant for the arrest of your husband, Mrs. Weldon." I told him Seth was asleep and that I was only dressed in my nightgown, and I requested time to get into some clothing. He said he'd give me three seconds. I ran into the bedroom and over to my husband's side of the bed and shook him. As I looked up Mr. Martindale was standing in the doorway and I stepped away from the bed. Mr. Martindale came into the room and went over to the bed beside my husband as Mr. Flack entered the room and stood just beside the door. Mr. Weldon rose and went into the bathroom with Mr. Martindale right behind him and I asked Mr. Flack if I [46] could dress (I was still in my nightgown). He told me that one of the agents would have to be present at all times, and I got a robe from the closet and slipped it on. Mr. Weldon and Mr. Martindale came back into the bedroom and Mr. Flack started making notes. I asked about these and he told me he was listing the furniture in the room. Mr. Martindale took out some notepaper and started asking Mr. Weldon some questions, his full name, etc. He asked if there was any money in the house and Mr. Weldon and I both produced our wallets. At this time Mr. Weldon went to the bedside table for his glasses and asked for permission to phone his attorney. We all left the bedroom, were introduced to Agents Haack and Geiermann, and Mr. Weldon called Mr. Davis. During the conversation Mr. Martindale asked to talk to Mr. Davis. During the

later part of the telephone conversation with Mr. Davis, I went into the kitchen, followed by one of the agents, to prepare coffee. Mr. Martindale then told us that he and Mr. Flack were going to search the bedroom and that portion of the house and that it was necessary for me to remain with the other two agents while they conducted a search of the livingroom, kitchen and service porch. As soon as Agents Martindale and Flack and Mr. Weldon went into the bedroom and closed the door, Mr. Haack sat down and started asking me questions. (He told me of my rights in the matter.) Mr. Haack showed me an affidavit signed by Leslie Vogt concerning a $50.00 bill. He questioned me concerning this and I told him I got the bill from my wallet and that it was the only one in my wallet at the time. I considered this the truth since I only removed money as I needed it from the cigarette case which I kept in my dresser drawer. Many questions were asked and one in particular was if I had any money when Seth and I were married. I asked if he meant cash and he nodded, and I told him that at the time I didn't have enough actual cash to buy proper clothes for a wedding since I had just purchased stock in a modeling school. [47] Agents Haack and Geierman then started searching the livingroom in the manner I described in my previous affidavit. The panels of the piano were removed. Agent Haack asked how it was done and I personally got up and showed him. Not only did he take the panel off but he tried every key; one didn't work and I explained that my cat knocked

over a vase and water must have damaged it. Mr. Haack was called out of the room and when he returned he said they had found $900.00 in a dresser drawer and I answered yes, in my drawer. He then proceeded to question me about this money. Being frightened I did not admit it to be mine right away. I requested that he question Mr. Weldon and leave me alone. He then told me that Mr. Weldon said it was mine after a few seconds I told them it was definitely mine and in answer to their questions, told them about Mr. Sussman and the notes. They took all this information down in detail and I asked if they had a right to take the money and he (Mr. Haack) said yes. They then asked a lot of questions about community property. I told Mr. Haack that he was asking me questions in such a way that it seemed he was putting words in my mouth. He very politely replied that he had no intention of doing such a thing; and then they continued the search into the kitchen and service porch. On the service porch, in a sewing machine drawer, they found a 3 x 5 index card listing money orders sent to Seth's mother in payment of a debt. I told them what it was, and they made out a receipt for me to sign. I told them that I wanted Mr. Weldon to read anything I signed, and they set it aside. We had a little conversation about how long Mr. Weldon and I had been married, and Mr. Haack said that he was under the impression that we were newlyweds. Mr. Martindale, Mr. Flack and Mr. Weldon then came out of the bedroom and were making ready to leave. I wanted Mr. Weldon to

have some breakfast, and they said they would stop on the way. They all left, but were barely out of the door when Mr. Flack and Mr. Geiermann came back in. Mr. Flack told me again of my [48] rights about answering questions; and then he immediately told me that I could be arrested as an accomplice, and that if there was anything I was hiding, or if Seth was hiding anything, now was the time to tell that. It was right then that I started crying. I asked if Seth could be free on bail, and they asked where I could get the money. I told them Mr. Arterburn would help me. Mr. Flack wrote this down, and I asked if they were going to check that too. He did not answer. He asked how we would live now; and I told them I would have to go to work right away. Mr. Flack was very gruff. When I hesitated several times in answering his questions, he said something like, "Come now, surely you know," in a very annoyed manner. In a little bit the phone rang. It was Mr. Martindale calling Mr. Flack. They had already reached their offices, and I asked Mr. Flack to ask Mr. Martindale if Seth had gotten his breakfast. They told me it was being sent up. I was still crying when Mr. Flack and Mr. Geiermann left. Mr. Flack, on leaving, apologised for having inconvenienced me, but Mr. Martindale never did. He says in his affidavit that he did, but he did not. I repeat that the search was not made with my consent. It was decidedly against my will and without my consent. I was in fear and trembling all the time it was going on; and I assumed, from what the officers said and the way

they acted, that there was nothing I could do about it but submit.

/s/ DOROTHY WELDON.

Subscribed and sworn to before me this 30th day of October, 1950.

[Seal] /s/ SENA W. TITGENS,
Notary Public in and for the County of San Diego, State of California.

[Endorsed]: Filed November 10, 1950.

AFFIDAVIT OF E. C. DAVIS

United States of America,
County of San Diego,
State of California—ss.

E. C. Davis, being first on oath duly sworn, deposes and says that he is a duly licensed and practicing attorney at law in the State of California, and that on the 2nd day of June, 1950, said 2nd day of June being on a Friday, that about the hour of 5:15 o'clock p.m., Seth J. A. Weldon completed the signing of a voluntary petition in bankruptcy, and that the said Seth J. A. Weldon was advised by your affiant that he believed that it was necessary to file voluntary petitions in bankruptcy with the Clerk of the United States District Court in Los Angeles, and that the general practice was to mail said petitions to the Clerk in Los Angeles, and that inasmuch as it was Friday evening, and your affiant did not believe that the Clerk of the District Court

in Los Angeles transacted business on Saturday that it would be Monday, June 5th, before said petition would be filed and an adjudication made.

That on or about the 4th day of July, 1950, at the hour of 6:15 affiant was called to the telephone by his wife and was advised by Seth J. A. Weldon that agents of the Federal Bureau of Investigation were at that moment in his house, and proposed to arrest him, or had arrested him, and he was advised by affiant that there was nothing affiant could do about it at that time in the morning, whereupon the said Seth J. A. Weldon called another party to the telephone who identified himself as Agent Martindale of the Federal Bureau of Investigation. The said party advised your affiant that he had arrested Seth J. A. Weldon and that it would be advisable and go easier on the said Seth J. A. Weldon if he would tell all at that time. [50] Whereupon affiant informed said party that so far as he knew there was nothing to tell. Whereupon the party on the other end of the telephone line stated to affiant that he proposed to conduct a search of the home of Seth J. A. Weldon, and affiant then asked him if he had a search warrant, and was informed that the search was being made incidental to the arrest and that he did not need a search warrant, and that further he would have the said Seth J. A. Weldon in the United States Commissioner's Office at 10 o'clock that morning, and that your affiant could see him at that time. No mention was made by the said party or affiant of money, either in the house or elsewhere, nor was any permission given by affiant

to the said party to conduct any kind of a search or to do anything else, nor did affiant say, either in words or effect, that "neither he nor his client objected to the search."

/s/ E. C. DAVIS.

Subscribed and sworn to before me this 3rd day of November, 1950.

[Seal] /s/ LOUELLA STEINER,
Notary Public in and for
Said County and State.

[Endorsed]: Filed November 10, 1950. [51]

In the United States District Court in and for the Southern District of California, Southern Division

(U. S. Com. No. 7101 (San Diego))

In the Matter of the Petition of

DOROTHY WELDON,

Petitioner.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SETH J. A. WELDON,

Defendant.

NOTICE OF MOTION

To the United States Attorney:

Please Take Notice that Dorothy Weldon, as peti-

tioner, will move the above-entitled Court, at its Courtroom, in San Diego, California, on Monday, November 27, 1950, at 10:00 a.m., to return to her the following-described property: $900.00 in currency; One cigarette case; Bill of sale for Crosley automobile; upon the ground that said property was illegally seized without a search warrant in violation of the Fourth Amendent, and that there was no probable cause for the issuance of a search warrant.

Said motion will be based upon the affidavits which have been filed in the above-entitled Court in support of the motion of Seth J. A. Weldon for the return of said property together with other property covered by his motion, and will be based upon the [52] authorities accompanying the motion of said Seth J. A. Weldon and upon the Brief filed in said matter by him.

Dated: November 14, 1950.

/s/ CLARENCE HARDEN,
Attorney for Dorothy Weldon.

[Endorsed]: Filed November 15, 1950. [53]

[Title of District Court and Cause.]

MOTION TO RETURN SEIZED PROPERTY

Dorothy Weldon, petitioner, hereby moves the above-entitled Court to direct that certain property, to wit: $900.00 in currency; One cigarette case; One bill of sale for Crosley automobile; be returned to

her, which property was on July 14, 1950, in the City of San Diego, County of San Diego, State of California, in the Southern Division of the Southern District of California, illegally seized and taken from her possession by four officers of the F.B.I. of the United States, upon the following grounds:

1. All of said property was illegally seized and taken from the possession of petitioner without any search warrant, without her consent and against her will, and without the consent and against the will of her husband.

2. There was no probable cause for the issuance of any [54] search warrant for said seizure or for the taking of any of said property, all of which appears in the affidavits filed herein in behalf of the motion now pending of said Seth J. A. Weldon, reference to which is made for further particulars.

/s/ CLARENCE HARDEN,
Attorney for Petitioner,
Dorothy Weldon.

State of California,
County of San Diego—ss.

Dorothy Weldon, being duly sworn, deposes and says: That she is petitioner in the within and above entitled action; that she has read the within and foregoing Motion to Return Seized Property and knows the contents thereof; that the same is true of her own knowledge, except as to the matters which are therein stated on her information and

belief, and as to those matters that she believes it to be true.

/s/ DOROTHY WELDON.

Subscribed and sworn to before me, this 14th day of November, 1950.

[Seal] /s/ SENA W. TITGENS,
Notary Public in and for said County and State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 15, 1950. [55]

United States of America,
Southern District of California,
Southern Division—ss.

AFFIDAVIT OF CHARLES B. FLACK, JR.

Charles B. Flack, Jr., being first duly sworn, deposes and says:

That on the morning of July 14, 1950, he was in the home of Seth J. A. Weldon as related in affiant's affidavit previously filed in this matter.

At no time did Mrs. Weldon ask the affiant to allow her to dress. Mrs. Weldon was dressed in a robe when affiant first observed her. Affiant did not state to Mrs. Weldon that an agent would have to be present with her at all times.

Affiant did not observe Mrs. Weldon crying. At no time was affiant gruff nor did he speak to Mrs. Weldon in an annoyed manner.

Affiant was present when Agent Martindale offered a receipt to Mr. Weldon. Weldon declined to sign the receipt, stating that it was correct but that he would not sign anything. Weldon did not object to the form of the receipt nor did he suggest any change in the form of the receipt. He did not state that he and his wife would execute receipts if the sum of $28.51 were listed in a receipt for his signature, and the sum of $900 listed in a separate receipt for Mrs. Weldon's signature.

/s/ CHARLES B. FLACK, JR.

Subscribed and sworn to before me this 17th day of November, 1950.

[Seal] EDMUND L. SMITH,
Clerk of U. S. District Court.

By /s/ J. M. HORNE,
Deputy. [59]

AFFIDAVIT OF IVAN D. HAACK

United States of America,
Southern District of California,
Southern Division—ss.

Ivan D. Haack, being first duly sworn, deposes and says:

On the morning of July 14, 1950, as stated in affiants affidavit previously filed in this matter, affiant was present in the living room of the Weldon home when Seth J. A. Weldon had a telephone conversation with his attorney. Seth J. A. Weldon stated during this conversation that he had

been arrested by Federal Bureau of Investigation Agents and said in effect that his arrest was connected in some manner with some $1000 bills he was supposed to have. One thousand dollars bills had not previously been discussed with Weldon in the presence of the affiant. After Seth J. A. Weldon concluded his conversation with his attorney, Agent Martindale talked to the attorney on the telephone. Agent Martindale stated in effect that he had arrested Seth J. A. Weldon by reason of a warrant of arrest and that he intended to search the house incidental to the arrest. Agent Martindale also stated in effect that he had reason to believe there was a considerable amount of money in the house and that much time and inconvenience would be saved if Weldon would voluntarily produce that money. At no time during the conversation did Agent Martindale tell the attorney that "it would be advisable and go easier on the said Seth J. A. Weldon if he would tell all at that time."

Affiant reiterates that Mrs. Weldon did not at any time state to the affiant that the money found in the Weldon's bedroom on the morning of July 14, 1950, was her property.

Two identical receipts were prepared for the 3 x 5 inch index card listing money orders totaling $500 sent to the mother of Seth J. A. Weldon on May 31, 1950, and June 1, 1950. Mrs. Weldon stated she did not wish to sign the receipt without first consulting Seth J. A. Weldon. Later, in the presence of Seth J. A. Weldon affiant again asked Mrs. Weldon if she cared to sign the receipt? Seth J. A. Weldon

then told his wife not to sign anything. Seth J. A. Weldon did not at any time while in the presence of the [60] affiant, object to the form of the receipt or state that he and his wife would sign receipts if they were prepared in some other manner.

/s/ IVAN D. HAACK.

Subscribed and sworn to before me this 17th day of November, 1950.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ J. M. HORN,
Deputy Clerk. [61]

AFFIDAVIT OF WILLIAM J. GEIERMANN

United States of America,
Southern District of California,
Southern Division—ss.

William J. Geiermann, being first duly sworn, deposes and says:

On the morning of July 14, 1950, as stated in affiants affidavit previously filed in this matter, affiant was present in the living room of the Weldon home when Seth J. A. Weldon had a telephone conversation with his attorney. Seth J. A. Weldon stated during this conversation that he had been arrested by Federal Bureau of Investigation Agents and said in effect that his arrest was connected in some manner with some $1000 bills he was supposed to have. One thousand dollar bills had not pre-

viously been discussed with Weldon in the presence of the affiant. After Seth J. A. Weldon concluded his conversation with his attorney, Agent Martindale talked to the attorney on the telephone. Agent Martindale stated in effect that he had arrested Seth J. A. Weldon by reason of a warrant of arrest and that he intended to search the house incidental to the arrest. Agent Martindale also stated in effect that he had reason to believe there was a considerable amount of money in the house and that much time and inconvenience would be saved if Weldon would voluntarily produce that money. At no time during the conversation did Agent Martindale tell the attorney [62] that "it would be advisable and go easier on the said Seth J. A. Weldon if he would tell all at that time."

Affiant reiterates that Mrs. Weldon did not at any time state to the affiant that the money found in the Weldon's bedroom on the morning of July 14, 1950, was her property.

Two identical receipts were prepared for the 3 x 5 inch index card listing money orders totaling $500 sent to the mother of Seth J. A. Weldon on May 31, 1950, and June 1, 1950. Mrs. Weldon stated she did not wish to sign the receipt without first consulting Seth J. A. Weldon. Later, in the presence of Seth J. A. Weldon, Agent Haack in the presence of the affiant again asked Mrs. Weldon if she cared to sign the receipt. Seth J. A. Weldon then told his wife not to sign anything. Seth J. A. Weldon did not at any time while in the presence of the affiant, object to the form of the receipt or

state that he and his wife would sign receipts if they were prepared in some other manner.

Mrs. Weldon was dressed in a robe when affiant first observed her. Affiant did not observe Mrs. Welding crying. At no time was Agent Flack gruff nor did he speak to Mrs. Weldon in an annoyed manner.

/s/ WILLIAM J. GEIERMANN.

Subscribed and sworn to before me this 18th day of November, 1950.

By /s/ HELEN E. DUNAWAY,
Notary Public, Washington,
D. C. [63]

AFFIDAVIT OF WILBUR L. MARTINDALE

United States of America,
Southern District of California,
Southern Division—ss.

Wilbur L. Martindale, being first duly sworn, deposes and says:

That he was present in the home of Seth J. A. Weldon on July 14, 1950, when Seth J. A. Weldon telephoned his attorney, E. C. Davis, as related in other affidavits filed in this matter.

Seth J. A. Weldon advised E. C. Davis that his arrest involved thousand dollar bills that he was supposed to have in his possession. The substance of Seth J. A. Weldon's statements in this regard was that it had been rumored that he possessed currency in the form of one thousand dollar bills

and that such rumors had been previously discussed between Seth J. A. Weldon and E. C. Davis. Affiant had not discussed any matter involving thousand dollar bills with Seth J. A. Weldon.

When affiant talked to E. C. Davis on the telephone, affiant stated that he had reason to believe that there was a substantial sum of money in the house and that all parties involved could be saved the inconvenience necessitated by a search if Seth J. A. Weldon would produce all money located in his home.

E. C. Davis replied as stated in affiant's prior affidavit that his client had told him there was no money in the house and that neither he nor his client objected to the search.

Affiant did not at any time state in words or in substance that "it would be advisable and go easier on the said Seth J. A. Weldon if he would tell all at that time."

A receipt was prepared in duplicate for the property seized in the bedroom of the Weldon home. Both copies may be described as original documents inasmuch as each was prepared with pen and ink and neither is a carbon copy. The receipt maintained in the files of the FBI is identical with the receipt set out in the affidavit of Seth J. A. Weldon except [64] that the following addendum was placed on this receipt in the presence of Seth J. A. Weldon:

> "Weldon was given a copy which he read and said was correct as far as he knew but refused to sign.

WLM

Witness—Charles B. Flack, FBI, San Diego."

Seth J. A. Weldon stated that he did not wish to sign the above receipt. He did not offer any reason for his unwillingness to sign it and he did not state that he would sign a receipt for his property in the sum of $28.51 if the sum of $900.00 were listed on a separate receipt for his wife's signature. Seth J. A. Weldon did not voice any objection to the form of the receipt.

/s/ WILBUR L. MARTINDALE.

Subscribed and sworn to before me this 17th day of November, 1950.

[Seal] EDMUND L. SMITH,
Clerk U. S. District Court, Southern District of California.

By /s/ J. M. HORN,
Deputy.

[Endorsed]: Filed November 24, 1950. [65]

In the United States District Court, Southern District of California, Southern Division

No. U. S. Commissioner's
No. 7101 San Diego

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SETH J. WELDON,

Defendant.

MINUTE ORDER

Judge Weinberger's Calendar, December 8, 1950

It appearing that Seth J. A. Weldon filed a petition for the suppression as evidence and the return to him of certain personal property seized by certain officers of the United States Federal Bureau of Investigation on July 14, 1950, and

It appearing that Dorothy Weldon, wife of Seth J. A. Weldon filed a petition for the return to her of certain personal property seized by said officers on said date, and

It appearing that all of the said property was seized by said officers after the same was found in an apartment jointly occupied by said petitioners, and

It appearing that said officers seized said property during a search which was incident to the lawful arrest of Seth J. A. Weldon, made upon the authority of a valid warrant for such arrest, It Is Ordered that the petition of Seth J. A. [66] Weldon is denied; and

It further appearing that petitioner Dorothy

Weldon has not established, to the satisfaction of the Court that the property she seeks to have returned to her was property solely owned by her and in which her husband had no interest, or that the said property was in her possession, as distinguished from the possession of her husband,

It Is Ordered that the petition of Dorothy Weldon is denied.

Copies to counsel.

[Endorsed]: Filed December 8, 1950. [67]

[Title of District Court and Cause.]

EXCEPTION TO RULING

Dorothy Weldon, petitioner in the above-entitled matter, notes and reserves an exception to the ruling and decision of the above-entitled Court denying her application and motion to return to her the following-described property: $900.00 in currency; one cigarette case; bill of sale for Crosley automobile, as the same appears of record in said proceeding, to which reference is made for further particulars.

Your petitioner, through her attorney, Clarence Harden, received notice of the order and decision of said Court, namely, minute order Judge Weinberger's calendar December 8, 1950, through the United States mail on Saturday, December 9, 1950, at about 11:00 a.m., and not before that time; and December 11, 1950, 10:00 a.m., the time when this exception will be filed with the Clerk of [68] said Court, is and has been the first available opportunity

petitioner has had to note and reserve said exception.

Dated: December 11, 1950.

/s/ CLARENCE HARDEN,
Attorney for petitioner,
Dorothy Weldon.

Receipt of Copy acknowledged.

[Endorsed]: Filed December 11, 1950.

[Title of District Court and Cause.]

EXCEPTION TO RULING

Seth J. A. Weldon, petitioner in the above-entitled matter, notes and reserves an exception to the ruling and decision of the above-entitled Court denying his application and motion to return to him the following-described property: $900.00 in currency; one cigarette case; bill of sale for Crosley automobile; one index card; (The sum of $28.51 and bill of sale for furniture having been returned to petitioner by the United States Attorney after the filing of his Petition herein), and an exception to the ruling and decision of said Court denying his application and motion to suppress said property as evidence in any and all criminal proceedings now pending or hereafter instituted in the above-entitled Court or before the Grand Jury, as the same appears of record in said proceeding, to which reference is made for further particulars. [70]

Your petitioner, through his attorney, Clarence Harden, received notice of the order and decision

of said Court, namely minute order Judge Weinberger's calendar December 8, 1950, through the United States mail on Saturday, December 9, 1950, at about 11:00 a.m., and not before that time; and December 11, 1950, 10:00 a.m., the time when this exception will be filed with the Clerk of said Court, is and has been the first available opportunity petitioner has had to note and reserve said exception.

Dated: December 11, 1950.

/s/ CLARENCE HARDEN,
Attorney for petitioner,
Seth J. A. Weldon.

Receipt of Copy acknowledged.

[Endorsed]: Filed December 11, 1950. [71]

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEYS

We hereby substitute and appoint Clarence Harden and Crandall Condra as our respective attorneys in the above-entitled matters in place of Clarence Harden as our sole attorney.

Dated: December 18, 1950.

/s/ SETH J. A. WELDON.

/s/ DOROTHY WELDON.

I consent:

/s/ CLARENCE HARDEN.

We accept:

/s/ CLARENCE HARDEN.

/s/ CRANDALL CONDRA.

Receipt of copy acknowledged.

[Endorsed]: Filed December 18, 1950. [72]

NOTICES OF APPEAL

Names and Addresses of Appellants: Seth J. A. Weldon, Dorothy Weldon, 3040½ Adams Avenue, San Diego, California.

Names and Addresses of Appellants' Attorneys: Clarence Harden, Crandall Condra, 530 Broadway, San Diego, California.

Offense:

Complaint filed before U. S. Commissioner charged Seth J. A. Weldon with violation of U. S.

C. A. Title 18, Section 152—fraudulent concealment of assets of bankrupt estate of Seth J. A. Weldon from the creditors of said estate.

No indictment.

No charge against Dorothy Weldon. [73]

Appeal by Seth J. A. Weldon from Order of above-entitled Court, in said matters, made by Hon. Jacob Weinberger, Judge, at San Diego, California, December 8, 1950, wherein the Court denied the petition of said Seth J. A. Weldon to suppress as evidence certain personal property, to wit: $900.00 in currency, one cigarette case, bill of sale of Crosley automobile, and one index card (the sum of $28.51 and bill of sale for furniture having been returned by U. S. Attorney pending hearing of his petitions), and appeal from said Order wherein the Court denied his petition for the return of said personal property;

Appeal by Dorothy Weldon from said Order of said Court, dated December 8, 1950, wherein the Court denied the petition of said Dorothy Weldon for the return of said sum of $900.00 in currency, said cigarette case, and said bill of sale for Crosley automobile; all of which property was seized by certain officers of the U. S. Federal Bureau of Investigation on July 14, 1950.

No sentence has been imposed.

Neither petitioner is confined. Petitioner, Seth J. A. Weldon is on bail fixed by U. S. Commissioner. [74]

I, said Seth J. A. Weldon, hereby appeal to the United States Court of Appeals, for the 9th Circuit, from the above-stated Orders.

I, said Dorothy Weldon, hereby appeal to the United States Court of Appeals, for the 9th Circuit, from the above-stated Orders.

Dated: December 18, 1950.

/s/ CLARENCE HARDEN,

/s/ CRANDALL CONDRA,

Attorneys for Appellants, Seth J. A. Weldon and Dorothy Weldon.

Receipt of copy acknowledged.

[Endorsed]: Filed December 18, 1950. [75]

STATEMENT BY APPELLANTS OF POINTS ON APPEAL

Each of the appellants, Seth J. A. Weldon and Dorothy Weldon, hereby designates the points on which said appellant intends to rely on appeal herein, as follows:

The Court erred:

1. In finding that the arrest of Seth J. A. Weldon was lawful;

2. In finding that the property in question was lawfully seized incidental to a lawful arrest of Seth J. A. Weldon;

3. In finding that Dorothy Weldon had not established that the property she sought to have returned to her was property solely owned by her and in which her husband had

no interest, or that the property was in her possession, as distinguished from the possession of her husband;

4. In refusing to order the return of said property;

5. In refusing to order the suppression of said property as evidence.

Dated: January 8, 1951.

/s/ CLARENCE HARDEN,
/s/ CRANDALL CONDRA,
Attorneys for Appellants, Seth J. A. Weldon and Dorothy Weldon.

Receipt of copy acknowledged.

[Endorsed]: Filed January 8, 1951. [76]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL BY SETH J. A. WELDON AND DOROTHY WELDON

Each of the petitioners, Seth J. A. Weldon and Dorothy Weldon, hereby designates the portions of the record, proceedings and evidence, in the above-entitled matters, to be included in the record on their respective appeals from the Order of December 8, 1950 (being the Judgment) of the United States District Court to the Court of Appeals, to wit:

(Omitting title of court and cause.)

Notice of Motion by Seth J. A. Weldon, dated October 17, 1950.

Motion for Suppression of Evidence and Return of Seized Property by Seth J. A. Weldon, dated October 17, 1950.

Points and Authorities in Support of said Motions.

Affidavit of Seth J. A. Weldon, in support of said Motions, dated October 17, 1950.

Affidavit of Dorothy Weldon, in support of said Motions, dated October 16, 1950. [77]

Affidavits of

Wilbur L. Martindale, of October 23, 1950;
William J. Geiermann, of October 24, 1950;
Ivan D. Haack, of October 24, 1950;
Charles B. Flack, Jr., of October 26, 1950.

Affidavits of

E. C. Davis, of October 27, 1950;
Dorothy Weldon, of October 30, 1950;
Seth J. A. Weldon, of October 30, 1950.

Affidavits of

Charles B. Flack, Jr., of November 17, 1950;
Ivan D. Haack, of November 17, 1950;
William J. Geiermann, of November 18, 1950;
Wilbur L. Martin, of November 17, 1950;

being the only affidavits of said affiants made in the month of November, 1950.

Notice of Motion, by Dorothy Weldon, dated November 14, 1950;

Motion to Return Seized Property, by Dorothy Weldon, verified November 14, 1950.

Minute Order, Judge Weinberger's Calendar, December 8, 1950 (being the Judgment).

Exception to Ruling, by Seth J. A. Weldon, dated December 11, 1950.

Exception to Ruling, by Dorothy Weldon, dated December 11, 1950.

Substitution of Attorneys (for petitioners), dated December 18, 1950.

Notices of Appeal (by Seth J. A. Weldon and by Dorothy Weldon).

Designation of Record on Appeal, by Seth J. A. Weldon and Dorothy Weldon.

Statement by Appellants of Points on Appeal.

Dated: January 8, 1951.

/s/ CLARENCE HARDEN,

/s/ CRANDALL CONDRA,
Attorneys for Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed January 8, 1951. [79]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 79, inclusive, contain the original Notice of Motion and Motion for Suppression of Evidence and Return of Seized Property; Points

and Authorities in Support of Motion; Separate Affidavits of Seth J. A. Weldon and Dorothy Weldon in Support of Motion to Suppress Evidence, etc.; Opposition to Motion for Suppression of Evidence and Return of Seized Property and Points and Authorities; Separate Affidavits of Wilbur L. Martindale, William J. Geiermann, and Ivan D. Haack; Affidavit of Charles B. Flack, Jr.; Separate Affidavits of Seth J. A. Weldon, Dorothy Weldon and E. C. Davis; Notice of Motion and Motion to Return Seized Property; Supplemental Memorandum of Opposition to Motion for Suppression of Evidence and Return of Seized Property with separate affidavits of Charles B. Flack, Jr., Ivan H. Haack, William J. Geiermann and Wilbunr L. Martindale; Minute Order Judge Weinberger's Calendar, December 8, 1950; Separate Exceptions of Dorothy Weldon and Seth J. A. Weldon to Ruling; Substitution of Attorneys; Notices of Appeal; Statement by Appellants of Points on Appeal and Designation of Record on Appeal which constitute the record on appeals to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 22nd day of January, A.D. 1951.

[Seal] EDMUND L. SMITH,
Clerk,

By /s/ THEODORE HOCKE,
Chief Deputy. [80]

[Endorsed]: No. 12818. United States Court of Appeals for the Ninth Circuit. Seth J. A. Weldon and Dorothy Weldon, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed January 24, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit. [81]

In the United States Circuit Court of Appeals
For the Ninth Circuit

In the Matter of

The SEVERAL PETITIONS of SETH J. A. WELDON and DOROTHY WELDON,

Petitioners.

CONCISE STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY ON APPEAL

Each of the appellants, Seth J. A. Weldon and Dorothy Weldon, hereby makes the following concise statement of points on which said appellants intend to rely on appeal herein as follows:

The Court erred:

1. In finding that the arrest of Seth J. A. Weldon was lawful;

2. In finding that the property in question was

lawfully seized incidental to a lawful arrest of Seth J. A. Weldon;

3. In finding that Dorothy Weldon had not established that the property she sought to have returned to her was property solely owned by her and in which her husband had no interest, or that the property was in her possession, as distinguished from the possession of her husband; [82]

4. In refusing to order the return of said property;

5. In refusing to order the suppression of said property as evidence.

Dated: January 24, 1951.

/s/ CLARENCE HARDEN,

/s/ CRANDALL CONDRA,

Attorneys for Appellants, Seth J. A. Weldon and Dorothy Weldon.

Receipt of copy acknowledged.

[Endorsed]: Filed January 29, 1951. [83]

No. **12818**

United States Court of Appeals

For the Ninth Circuit

SETH J. A. WELDON and DOROTHY WELDON,
Appellants

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' BRIEF

CLARENCE HARDEN
CRANDALL CONDRA
504 San Diego Trust Bldg.
San Diego, California
Attorneys for Appellants

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For the Ninth Circuit

SETH J. A. WELDON and DOROTHY WELDON,
Appellants

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' BRIEF

Jurisdiction of District Court

U. S. Code, Title 18, Section 3771 confers jurisdiction on the Supreme Court to make rules for District Courts which shall have the force of law. Pursuant to said authority, a rule has been adopted which is applicable in this case, as follows:

Rule 41 (e) of the Rules of Criminal Procedure of the United States District Court provides:

A person aggrieved by any unlawful search or seizure may move the District Court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that—

1. The property was illegally seized, without warrant.

2. The warrant is insufficient on its face.

3. The property seized is not that described in the warrant.

4. There was no probable cause for believing the existence of the grounds on which the warrant was issued.

Jurisdiction of the Court of Appeals

Jurdisdiction is conferred upon the Court of Appeals in this case by U. S. Code, Title 28, Section 1291.

Appellants believe it to be expedient to cite at this point a few cases having relation to this subject, as follows:

No proceedings whatever having been instituted against Dorothy Weldon, she has an undoubted right to appeal from the order.

U. S. vs. *Rosenwasser,* 145 F. (2d) 1015.

Go-Bart Importing Co. vs. *U. S.,* 282 U. S. 344, 356; 51 S. Ct. 153.

Perlman vs. *U. S.,* 247 U. S. 7; 38 S. Ct. 417.

Seth J. A. Weldon also has a right of appeal from said order.

Cogen vs. *U. S.,* 278 U. S. 221, 225; 49 S. Ct. 118.

In re Milburne, 77 F. (2d) 310.

In re Sana Laboratories, 115 F. (2d) 717.

The fact that a complaint was filed before the United States Commissioner against Weldon does not bar an appeal, since said proceeding is not considered to be a pending action.

U. S. vs. *Poller*, 43 F. (2d) 911.

By waiving the preliminary examination before the United States Commissioner, an accused does not waive his right to complain as to the sufficiency of the complaint.

U. S. vs. *Ruroede*, 220 F. 210.

Though an indictment had been returned pending the hearing of the motions, the appeal would still lie.

Goodman vs. *Lane*, 48 F. (2d) 32.

In re Sana Laboratories, 115 F. (2d) 717.

Where a stranger to pending proceedings brings a petition for return of property seized in violation of the Fourth Amendment, the proceeding is in the nature of a suit in equity.

U. S. vs. *Rosenwasser*, 145 F. (2d) 1015.

Go-Bart Importing Co. vs. *U. S.*, 282 U. S. 344, 356; 51 S. Ct. 153.

The United States Attorney and Federal Bureau of Investigation are subject to the orders of this Court.

U. S. vs. *Rosenwasser*, 145 F. (2d) 1015.

U. S. vs. *Antonelli Fireworks Co.*, 53 F. Sup. 870, 873.

The motions for return of property and its suppression as evidence, (R. 2 and R. 47), constitute the only pleadings in the case.

Affidavits in support of said motions and counter-affidavits were filed. The case as made was entirely by affidavit. No oral evidence was received.

Statement of the Case

This case arises out of an alleged unlawful search and seizure of property at the home of the petitioners, in violation of the Fourth Amendment.

Shortly after 6:00 A.M., on July 14, 1950, Wilbur L. Martindale, Charles B. Flack, Jr., William J. Geiermann, and Ivan B. Haack, special agents of the Federal Bureau of Investigation, came unexpectedly to the place of residence of Seth J. A. Weldon and his wife, Dorothy Weldon, at 3040½ Adams Avenue, San Diego, California, and, having knocked at the door, informed Mrs. Weldon that they had come to place her husband under arrest. Shortly thereafter said agents entered, placed Mr. Weldon under arrest, and announced their intention of searching the premises for property which they thought to be concealed there.

A thorough search was conducted, in the course of which they found $900.00 in currency, contained in a cigarette case, among the clothing of Mrs. Weldon in a dresser drawer in her bedroom; two bills of sale, one for a Crosley automobile and one for furniture, were also found and taken from the dresser of Mrs. Weldon. $28.00 in currency was taken from a wallet which was found on top of a chest of drawers in the bedroom, and 51c in small change from the top of the chest of drawers; and at the same time an index card was taken from the inside of a sewing machine on the service porch.

Previous to the time of the search a complaint had

been filed against said Seth J. A. Weldon before the United States Commissioner at San Diego charging him with a violation of U. S. C. A. Title 18, Section 152, in that he knowingly and fraudulently concealed assets from the creditors of his bankrupt estate. The officers were armed with a warrant of arrest issued on said complaint at the time of the arrest and search; but they had no search warrant.

Claiming that the search was unlawful and in violation of the Fourth Amendment in that it was an unlimited exploratory search, made without a search warrant, and also that the arrest was illegal—

Said Seth J. A. Weldon moved that said sum of $900.00 in currency, cigarette case, and two bills of sale be returned to his wife, Dorothy Weldon, and that $28.51 and one index card be returned to him; and he also moved that all of said evidence be suppressed.

Dorothy Weldon, by separate petition, moved that said sum of $900.00 in currency, one cigarette case, and bill of sale for Crosley car be returned to her.

After one hearing on the whole matter, each petition was denied. This is an appeal from the order of the Court denying said petitions.

Specifications of Error

Appellants respectfully submit that the Honorable District Court erred:

1. In finding that the arrest of Seth J. A. Weldon was lawful;

2. In finding that the property in question was lawfully seized incidental to a lawful arrest of Seth J. A. Weldon;

3. In finding that Dorothy Weldon had not established that the property she sought to have returned to her was property solely owned by her and in which her husband had no interest, or that the property was in her possession, as distinguished from the possession of her husband;

4. In refusing to order the return of said property;

5. In refusing to order the suppression of said property as evidence.

Summary of Argument

Point 1:

The complaint does not state a public offense.

The warrant of arrest was illegal.

The arrest was as if without a warrant.

Point 2: Agents of the Federal Bureau of Investigation may not arrest without a warrant except where there is reasonable ground to believe that the person arrested is guilty of a felony and that there is likelihood of his escaping before a warrant can be obtained for his arrest; and there was no such evidence.

Point 3: The search was not lawfully incidental to an arrest. It was an unlimited exploratory search for evidence, in violation of the Fourth Amendment.

Point 4: Ownership of the property seized, as between petitioners, was a false quantity.

Point 5: The Fourth Amendment is to be liberally construed in favor of the petitioners.

Point 6: The property having been seized in violation of the Fourth Amendment, it should have been returned; and it should also have been suppressed as evidence.

Argument

Point 1

The complaint does not state a public offense.

The warrant of arrest was illegal.

The arrest was as if without a warrant.

The illegality of the warrant of arrest arises from the insufficiency of the complaint filed before the United States Commissioner. The charging part of that complaint reads as follows:

> "That on or about June 10, 1950, at San Diego in the Southern District of California, the above-named defendant did knowingly and fraudulently conceal from the creditors of the bankrupt estate of Seth J. A. Weldon, doing business as Weldon's Modern Home Stores, San Diego, California, property belonging to said bankrupt estate." (Tr. p. 37)

Rule 3 of the Rules of the District Court, applicable to such complaints, is:

> "The complaint is a written statement of the essential facts constituting the offense charged . . ."

Rule 4 of said Court provides:

> "If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue," etc.

The complaint in this case states nothing but legal conclusions and is insufficient. It does not identify any

property which the accused is charged with having concealed; and the accused was therefore not informed of one of the necessary elements of the offense charged against him. Direct authorities, so holding, are—

U. S. vs. *Fuselier*, 46 F. (2d) 568.

White vs. *U. S.* 67 F (2d) 71.

See also

U. S. vs. *Hess*, 124 U. S. 483, 8 S. Ct. 571.

Persuasive authority to the same effect is found in a case where the accused was charged with perjury for having falsely omitted from his schedule in bankruptcy certain of his property, and wherein it was held that the indictment must not only allege that his deposition was false but it must go further and allege that he had other property, and describe the property so omitted; otherwise it does not inform him of the offense with which he is charged, and does not contain proper averments to falsify the matter wherein the perjury is assigned.

Bartlett vs. *U. S.*, 106 F. 884 (9th Cir.)

The arrest of Seth J. A. Weldon on a warrant issued on said property can not be justified.

U. S. vs. *Haberkorn*, 149 F. (2d) 720.

Point 2

The Agents of the Federal Bureau of Investigation Were Not Authorized to Arrest Weldon Without a Valid Warrant of Arrest. The Warrant was invalid.

Officers of such Bureau may arrest without a warrant only when they have reasonable grounds to believe that the person arrested is guilty of a felony and there is a likelihood of his escaping before a warrant can be obtained for his arrest; and there is no such evidence in this case.

It was so held in—

U. S. vs. *Haberkorn,* 149 F. (2d) 720.

Said case turned on a statute which was in effect at that time,

U. S. C. A. Title 5, Sec. 300-a,

reading as follows:

> "The agents of the Federal Bureau of Investigation . . . are empowered . . . to make arrests without warrants for felonies which have been committed and which are cognizable under the laws of the United States in cases where the person making the arrest has reasonable grounds to believe . . . there is a likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be immediately taken before a committing magistrate."

In said case of—

U. S. vs. *Haberkorn,* 149 F. (2d) 720,

it was held that the warrant of arrest was invalid

because the complaint was insufficient; therefore, the arrest was as if made without a warrant; also that F. B. I. agents could arrest without a warrant only when the person arrested was likely to escape.

Said statute was repealed by

> 62 Statutes at Large 862 (866), Chapter 645, Sec. 21, effective September 1, 1949. 1948.

However, said case undoubtedly states the law as it existed at the time of the arrest in the instant case for the reason that another statute, in substantially the same form, was enacted June 25, 1948—

> 62 Statutes at Large 817, Chapter 645, Sec. 3052, reading as follows:
>
> "The director, assistant directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests, without warrants, for felonies cognizable under the laws of the United States where the person making the arrest has reasonable grounds to believe that the person arrested is guilty of such felony and that there is likelihood of his escaping before a warrant can be obtained for his arrest."

The unlawful search in this case cannot, therefore, be justified on the theory that it was made incidental to a lawful arrest for the reasons aforesaid:

1. The arrest was as if no warrant had been issued.

2. Without a warrant the F. B. I. agents had no authority to make any arrest whatever.

Point 3

The Search Was Not Lawfully Incidental to an Arrest. It Was Unlimited and Exploratory, In Search of Evidence.

This point involves questions of fact principally.

DOROTHY WELDON averred:

"Later on, and within a few minutes of their arrival as aforesaid, two of said men, whose names are unknown to me, in the absence of my husband and the other two officers who were in the bedroom, came into my livingroom, and one taking one side of the room and the other the opposite, they went through every drawer, every box, opened every piece of linen, turned over chairs and tables, looked under the rugs, took the panels out of the piano and searched the piano, looked into the radio and phonograph, looked into my personal correspondence box, opened every envelope, personal letters, and otherwise, looked in vases, books and magazines, and then had me move off the couch to check the cushions and inner linings. While they were searching, one of the men left the room and went out into the back yard. At that time the sum of $900.00 in the form of three $100.00 bills and twelve $50.00 bills was in my cigarette case in my bureau drawer among my clothing in the bedroom." (R. p. 8) "At said time said officers also took from my dresser drawer and from my possession a bill of sale for a 1948 Crosley pickup automobile made out to Anita Prince and also a bill of sale for furnishings made out to Paul S. Prince.

Said documents were left in my possession by Mrs. Prince, when she and her husband moved, to be picked up later." (R. p. 10) "The panels of the piano were removed. Agent Haack asked how it was done and I personally got up and showed him. Not only did he take the panel off but he tried every key; one didn't work and I explained that my cat knocked over a vase and water must have damaged it." (R. pp. 41 and 42) . . . "They continued the search into the kitchen and service porch. On the service porch, in a sewing machine drawer, they found a 3 x 5 index card listing money orders sent to Seth's mother in payment of a debt." (R. p. 42)

These averments are nowhere denied except for the denial that the panels of the piano were removed. (R. pp. 21, 26)

SETH J. A. WELDON averred:

"I know of my own knowledge that one of said officers took from my wife's dresser drawer, among her clothing, a cigarette case containing three $100.00 bills and twelve $50.00 bills, a total of $900.00, the property of my wife, acquired, as I verily believe, under the circumstances set forth in her accompanying affidavit, which I have read and believe to be true." (R. p. 6)

"At that time two bills of sale, the property of Anita Prince and Paul S. Prince, were also taken from the possession of my wife. (R. p. 6) . . . On said occasion, while in the process of searching said premises, one of

said men took from my wallet which was on top of a chest of drawers in the bedroom, the sum of $28.00 in currency, and also took from the top of the chest of drawers 51c in small change, all of which was my property. At said time said officers also took from the service porch of said premises an index card, about 3 x 5 in. ruled on one side, in the handwriting of my wife, which was my property." (R. p. 7)

Said averments were not denied.

SETH J. A. WELDON also averred:

As soon as Mr. Martindale entered affiant's bedroom and affiant raised himself from his bed, affiant found the necessity of relieving himself and going to the toilet for the purpose of urinating. This he did, and agent Martindale stood beside affiant while he was in the process of urinating in the toilet bowl, and said Martindale kept close watch of all actions and movements of affiant during that act, and he even observed affiant's private parts.

In addition to the search made of the property, as detailed in the original affidavits on file, in support of the motion to suppress and return evidence, said officers made a thorough search of the bathroom of said parties, opening and inspecting every article that was therein, including a box of Kotex, the property of affiant's wife. This box was opened, the contents emptied out, and thoroughly searched for hidden articles therein. (R. p. 36)

Said averments were not denied.

Agent Martindale, who appeared to be in charge, averred (R. p. 15) that during the course of the search he spoke with Attorney Davis, representing Mr. Weldon, over the phone and stated that he (Martindale) believed money "was *concealed* in Weldon's home and that Weldon's home was to be searched incidental to the arrest." He stated further (R. p. 16), that he explained to Mr. and Mrs. Weldon that the search would be expedited if two agents searched the living room while the other two agents searched the bedroom. Also that he and Agent Flack found a cigarette case, containing $900.00 in currency, in a dresser drawer in the bedroom (R. p. 16). "The search of the bedroom conducted by affiant and Agent Flack also revealed a bill of sale" (for the Crosley car) (R. p. 17). "A 3x5 index card was *seized* by Agents Geiermann and Haack" (R. p. 17). Martindale stated to Weldon that "inasmuch as the search was legally conducted incidental to Weldon's arrest, such search would have been carried out despite any objections." (R. p. 18).

Agent Geiermann averred, among other things: That Martindale explained to Mr. and Mrs. Weldon that the search would be expedited if two agents searched the living room, while the other two agents searched the bedroom. (R. p. 20.) Agents Haack and Geiermann "carefully searched the living room, the kitchen and the service porch. The panels were not removed from the piano, although a thorough search was conducted."

(R. p. 21.) In a drawer in a sewing machine on the service porch Agent Haack found a 3x5 index card. (R. p. 21.)

Agent Haack averred: Agent Martindale then took the telephone and stated that he believed there was money *concealed* in Weldon's home, and that Weldon's home was to be searched incidental to the arrest. (R. p. 25.) Upon completion of the telephone conversation, Agent Martindale explained to Mr. and Mrs. Weldon that the search would be expedited if two agents searched the living room, while the other two searched the bedroom (R. p. 25). Agent Geiermann and affiant (Haack) carefully searched the living room, the kitchen and the service porch. The panels were not removed from the piano, although a thorough search was conducted. . . . (R. p. 26). In a drawer in a sewing machine on the service porch affiant found a 3x5 index card (R. p. 26).

Agent Flack averred: That the attorney was advised over the phone that the agents had stated "that they intended to search the house in connection with his arrest although they did not hold a search warrant." (R. p. 31). Agent Martindale explained to Mr. and Mrs. Weldon that the search would be expedited if two agents searched the living room while the other two searched the bedroom. (R. p. 31.) Affiant and Agent Martindale found a cigarette case in a dresser drawer in the bedroom. Inside of this case was the sum of $900.00 in currency (R. p. 32). The search of the bedroom,

conducted by affiant and Agent Martindale, also revealed a bill of sale on the printed form of Nash San Diego, Inc., reflecting the sale of a Crosley automobile. (R. p. 32).

The foregoing undisputed facts establish, the appellants respectfully contend, that the search was unlimited and exploratory, in search of evidence. In fact, the officers went to the premises for the purpose of conducting the search. All the circumstances indicate that to be a fact. There was no likelihood that Weldon would escape; nevertheless, the officers chose 6:00 A.M. as the time for their visit and search. The arrest of Mr. Weldon was in fact incidental to the search—not the search incidental to the arrest.

The law in such a situation is clear.

This is not the case where, at the time of a valid arrest the arresting officer looked around and seized "fruits of evidence" of crime or contraband articles which were in plain sight and in his immediate and discernible presence, as in

U. S. vs. *Lee,* 274 U.S. 559, 47 S.Ct. 746.

Marron vs. *U.S.,* 275 U.S. 192, 48 S.Ct. 74.

The search in this case was such as is denounced by

Go-Bart Importing Co. vs. *U.S.,* 282 U.S. 344; 51 S.Ct. 153.

U.S. vs. *Lefkowitz,* 285 U.S. 452, 52 S.Ct. 420.

The right to enter the precincts of a home must be incidental only to a lawful arrest, and not for the purpose of securing evidence upon which to justify the arrest.

U.S. vs. *Vleck*, 17 F.Sup. 110.

In said case of *U.S.* vs. *Lefkowitz*, 285 U.S. 452, 52 S.Ct. 420, it is stated at page 461 as follows:

> "The Circuit Court of Appeals reversed (52 F. (2d) 52). It found that the search of the person of Lefkowitz was lawful and that the things taken might be used as evidence against him; held that the things seized when the office and furniture were explored did not belong to the same class; referred to *'the firmly rooted proposition that what are called general exploratory searches throughout premises and personal property are forbidden,'* and said that it did not matter 'whether the articles or personal property opened and the contents examined are numerous or few, the right of personal security, liberty, and private property is violated if the search is general, for nothing specific, but for whatever the containers may hide from view, and is based only on the eagerness of officers to get hold of whatever evidence they may be able to bring to light. . . . Such a search and seizure as these officers indulged themselves in is not like that in *Marron* vs. *United States*, 275 U.S. 192, where things openly displayed to view were picked up by the officers and taken away at the time the arrest was made. The decision that does control is *Go-Bart Importing Co.* vs. *United States*, 282 U.S. 344. Indeed, this case differs in its essential facts from

> that one so slightly that what is said in that opinion in characterizing the search made will apply with equal force to this one, which must accordingly be held unreasonable."

On page 463 of the same decision we find the following:

> "Save as given by that warrant and as lawfully incident to its execution, the officers had no authority over respondents or anything in the room. The disclosed circumstances clearly show that the prohibition agents assumed the right, contemporaneously with the arrest, to search out and scrutinize everything in the room to ascertain whether the books, papers, or other things contained or constituted evidence of respondents' guilt of crime, whether that specified in the warrant or some other offense against the act. Their conduct was unrestrained. The lists printed in the margin show how numerous and varied were the things found and taken . ."

Even if the F. B. I. agents had held a search warrant, still the search conducted in this case would not have been justified.

In *Gouled* vs. *U.S.*, 255 U.S. 298, 41 S.Ct. 261, it is stated:

> "Although search warrants have thus been used in many cases ever since the adoption of the Constitution, and although their use has been extended from time to time to meet new cases within old rules, nevertheless it is clear, at common law and as the result of the *Boyd* and *Weeks* cases, supra, they may not be used as a means of gaining access

to a man's house or office and papers, *solely for the purpose of making search to secure* evidence to be used against him in a criminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken . . ."

(P. 309)

"While the contents of this paper are not given, it is impossible to see how the Government could have such an interest in such a paper that, under principles of law stated, it would have the right to take it into its possession to prevent injury to the public from its use. *The Government could desire its possession only to use it as evidence against the defendant, and to search for and seize it for such purpose was unlawful.*"

(P. 310)

The leading cases of

Boyd vs. *U.S.*, 116 U.S. 616, 6 S.Ct. 524;

Weeks vs. *U.S.*, 232 U.S. 383, 34 S.Ct. 341,

also strongly support appellant's position.

Point 4

Ownership of the Property Seized, as Between Petioners, Was a False Quantity.

The Honorable District Court denied the petition of *Dorothy Weldon* for the return of the property which petitioners sought to have returned to her for the reason that the Court found she had not established, to the satisfaction of the Court, that said property was solely owned by her and in which her husband had no interest, or that said property was in her possession, as distinguished from the possession of her husband. (R. pp. 57 and 58.) It is respectfully submitted that said decision is based on a false issue.

There was no denial of any of the averments of petitioners as to the nature and the origin of the property.

The property might even have been property concealed from the bankrupt estate; and it would still have been unlawful to seize it under the circumstances.

It was in the possession of the petitioners; and the gravamen of their complaint was that it was unlawfully taken from them in violation of the Fourth Amendment.

That amendment protects offenders as well as law-abiding citizens. A search such as was conducted in this case cannot be justified by the result.

U.S. vs. *Lefkowitz,* 285 U.S. 542; 52 S.Ct. 420.

Weeks vs. *U.S.*, 232 U.S. 383, 34 S.Ct. 341.

As shown by the evidence, the petitioners owned all of the property in question with the exception of the two bills of sale;; and Mrs. Weldon had a possessory right to that property. (R. pp. 8, 10, 11, 12 and 13.)

Such possessory right was sufficient to justify the petition.

Connolly vs. *Medalie*, 58 F.(2d) 629.

Point 5

Liberal Construction of Fourth Amendment

Constitutional provisions for the security of persons and property are to be liberally construed and, it is the duty of courts to be watchful of the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Boyd vs. *U.S.*, 116 U.S. 616, 635; 6 S.Ct. 524.

Gouled vs. *U.S.*, 255 U.S. 304; 41 S.Ct. 261.

Point 6

Property Should Have Been Returned and Evidence Thereof Suppressed.

Appellants respectfully contend, therefore, without further argument, that, the property having been seized in violation of the Fourth Amendment, it should have been returned; and it should also have been suppressed as evidence.

Respectfully submitted,

CLARENCE HARDEN,

CRANDALL CONDRA,

Attorneys for Appellants.

No. 12818.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SETH J. A. WELDON and DOROTHY WELDON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

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APPELLEE'S REPLY BRIEF.

Jurisdictional Statement.

Appellee does not challenge this Court's jurisdiction to review the District Court's order denying the motions to suppress and return the seized properties, but does call attention to the fact that some opinions have classified such an order as interlocutory, and that a distinction exists between the respective positions of the two appellants.

According to authorities to be discussed under a separate heading, there is responsible authority holding that so far as appellant Seth J. A. Weldon is concerned the order appealed from is not a "final decision" as required by Section 1291 of Title 28, United States Code. However, so far as appellant Dorothy Weldon is concerned, the order denying her motion appears to be appealable as a final decision as distinguished from an interlocutory order.

To this effect:

United States v. Rosenwasser, 9 Cir., 1944, 145 F. 2d 1015.

Statement of the Case.

This case arises from an appeal from a Minute Order denying the petitions of (1) Seth J. A. Weldon for the return and suppression of certain seized property, and (2) a like petition filed by Dorothy Weldon, the wife, seeking the return of the same property upon the contention that such property was her personal property. [R. 57.]

The property sought to be returned was seized attendant to the arrest of Seth J. A. Weldon. This arrest was conducted July 14, 1950, at which time agents of the Federal Bureau of Investigation were possessed with a warrant for the arrest of Mr. Weldon. As an incident to the arrest of Mr. Weldon, a search was conducted of the apartment occupied by the appellants, husband and wife. Among other things, the $900.00 in currency, the cigarette case in which the currency was contained and two bills of sale were seized. As noted, the currency consisted of twelve $50.00 bills and three $100.00 bills.

A verified complaint had been filed before the United States Commissioner, charging Mr. Weldon with knowingly and fraudulently concealing assets from the creditors of his bankrupt estate, pursuant to 18 United States Code, Section 152. The petitions filed in the District Court by the now appellants did not in so many words charge that the arrests conducted were illegal. They did, of course, seek either the return or the suppression of the use of such evidence.

There appears to be some substantial conflict of facts between the affidavits filed on behalf of the appellants and

those of the Federal Bureau of Investigation agents filed on behalf of the Government. Inasmuch as the record is relatively brief and is reflected in the several affidavits, no special effort shall now be made to single out such conflict. However, by way of illustration, the following is noted.

Agent Geiermann affirmed that Mrs. Weldon had stated that to her knowledge there was no money in the house. [R. 21, 26.]

That a $50.00 bill used by Mrs. Weldon in a previous transaction was the only $50.00 bill she had. [R. 20-21.]

After the search revealed the presence of the $900.00 in currency, and this fact was made known to Mrs. Weldon, she would give no direct answer as to whom the money belonged. [R. 22.]

And at no time did Mrs. Weldon state that the money found belonged to her, although she was asked this specific question several times. [R. 22-23.]

Mrs. Weldon told Agent Haack that when she married Mr. Weldon she did not have any money and did not even have proper clothes. [R. 21.]

ARGUMENT.

I.

Does This Court Have Jurisdiction to Review the District Court's Order Denying the Petitions to Suppress and Return the Seized Articles?

Appellee's position on this point is to merely call to the attention of this Court several of the leading authorities on this proposition.

Appellant Mrs. Weldon was a stranger to the criminal action; she was not named as a defendant in the complaint that was filed. [R. 37-38.] Such being the case, it would appear that, pursuant to 28 United States Code, Section 1291, so far as Mrs. Weldon is concerned, the order denying her petition for the return of the property was a "final decision."

To this effect:

United States v. Rosenwasser, 9 Cir., 1944, 145 F. 2d 1015, 1017:

> "* * * Similarly, if the suppression of evidence is sought by a stranger to the criminal action, the proceeding is regarded as independent and an order therein is final and appealable. Go-Bart Importing Co. v. United States, 1931, 282 U. S. 344, 356, 51 S. Ct. 153, 75 L. Ed. 374. * * *"

That a distinction exists with reference to a party to such criminal proceeding, the following is quoted from the *Rosenwasser* case:

> "However, if a party to a pending criminal action seeks the suppression of evidence together with the re-

turn of the seized papers and if the principal purpose of the motion is to suppress evidence at the criminal trial, the proceeding is incidental to the criminal action, and the resulting order is held to be interlocutory and not appealable Cogen v. United States, 1929, 278 U. S. 221, 49 S. Ct. 118, 73 L. Ed. 275; * * *"

To like effect as holding that such an order is interlocutory, that is, when it is sought to suppress the seized evidence, reference is had to:

Cogen v. United States, 278 U. S. 221 (1929), affirming 24 F. 2d 308.

Compare:

United States v. One 1946 Plymouth Sedan, 7 Cir., 1948, 167 F. 2d 3.

This Court held that an order denying a return and suppression of documents which were alleged to have been illegally seized was a final, appealable order. See:

Freeman v. United States, 9 Cir., 1946, 160 F. 2d 72.

Also note:

Companion opinion 160 F. 2d 69.

II.

The Complaint States an Offense, Hence, the Warrant for Arrest Was Legal and Supported the Search Conducted Incidental to the Arrest of Mr. Weldon.

Appellants argue that the complaint was insufficient. It is true that as to indictments, as distinguished from complaints, it is better practice to allege more detailed facts than were set forth in this complaint. The rule pertaining to complaints requires the following:

> "* * * a written statement of the essential facts constituting the offense charged."
>
> Rule 3 of Federal Rules of Criminal Procedure.

Whereas in setting forth the requirements of an indictment a more severe and definite definition is had.

Rule 7 of Federal Rules of Criminal Procedure, pertaining to indictments, provides in part:

> "The indictment * * * shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

While there is some similarity in defining the contents of a complaint and an indictment, it is also quite apparent that a stricter rule pertains as far as an indictment is concerned.

It is generally held that the same precision and formality are not required in complaints that are required in indictments. To this effect:

> *United States v. Price,* D. C. N. Y., 1897, 84 Fed. 636.
>
> "*In re* Paul, 2 N. Y. Cr. R. 6. And see People v. Wheeler, 73 Cal. 252, 14 Pac. 796. The same precision and formality are not required in complaints that are required in indictments. * * *"

In the instant case, the offense charged was brought under 18 United States Code, Section 152, that is, a charge pertaining to the concealment of assets in connection with a bankruptcy proceeding.

The "essential facts" or elements of such an offense were contained in the instant complaint. An analysis of this complaint will so indicate. By way of illustration, we find (1) the date is alleged, (2) the location where the offense occurred is alleged, (3) the phrase "knowingly and fraudulently", as employed in the statute, is charged, (4) the concealment from the creditors of the bankrupt estate of Seth J. A. Weldon (the defendant) is charged, and (5) the character of the things charged to be concealed is characterized as "property."

Appellants complain that because the property alleged to have been concealed is not more specifically characterized the complaint is insufficient. It is submitted that the term "property" is a very broad term and that such designation is adequate, and that, while it might have been better pleading to have particularized, still the general, all-inclusive term "property" is sufficient.

The Bankruptcy Act, unlike some federal statutes, does not differentiate between the amount or value of the property that must be concealed to constitute such an offense. While it is improbable that anyone would be prosecuted for the concealment of property of a very slight value, still the amount or character is no defense. Hence, it would appear that it was not necessary to have alleged more than was contained in the instant complaint.

A case directly in point, wherein it was held that the value of the property concealed is not an *essential* part of the crime, is:

> *Kanner v. United States,* 2 Cir., 1927, 24 F. 2d 285, 287.

In the *Kanner* case, it was urged that the indictment was insufficient because it did not particularly describe nor value the property alleged to have been concealed. The Court stated, in sustaining the indictment, at page 287:

> "* * * But the value of the property concealed is not an essential part of the crime. The statement of it is therefore surplusage."

Purely by way of persuasion, attention is invited to the rule of law so far as complaints for extradition are concerned. Here, too, do the Courts recognize that such a complaint need not set forth the offense with the particularity of an indictment.

> *Bernstein v. Gross,* 5 Cir., 1932, 58 F. 2d 154.
>
> "* * * We are not here concerned with refinements of pleading in either jurisdiction, such as the necessity of more minutely describing the money ob-

> tained or alleging its value. Extradition will not be refused for such defects. Fernandez v. Phillips, 268 U. S. 311, 45 S. Ct. 541, 69 L. Ed. 970." (P. 155.)

The cases cited by appellants in support of their contention of the insufficiency of the instant complaint appear to all refer to *indictments* and *not* rulings of the Court with reference to *complaints*. It has already been noted, both from the quoted Federal Rules and from practice, that the same precision and formality is not required in complaints as is required in indictments.

* * * * * * * * *

Even with respect to indictments, the modern practice, especially since the adoption of the Federal Rules of Criminal Procedure, is to consider the adequacy of indictments on the basis of practical as opposed to technical considerations.

The sufficiency of Form 1 of the Appendix of Forms to the rules of criminal procedure was held to be ample in a murder charge, although this form omits the phrase "with malice aforethought," which phrase is specifically set forth in the statutory definition of murder. (18 United States Code, 452, 1946 Ed.)

To such effect:

> *United States v. Ochoa,* 9 Cir., 1948, 167 F. 2d 341.

The sufficiency of Form 6 of the Appendix of Forms of the Rules of Criminal Procedure was sustained, although the information charging the transportation of a stolen vehicle failed to charge "interstate or foreign commerce," but did charge transportation from one state to another.

See:

Godish v. United States, 10 Cir., 1950, 182 F. 2d 342.

Although the Rules and Form 6 were not in effect at the time of the offense charged, the Appellate Court considered Form 6 "* * * powerfully persuasive that an indictment in such form is constitutionally sufficient to inform the defendant of the nature and cause of the accusation against him, * * *."

To this effect:

Myles v. United States, 5 Cir., 1948, 170 F. 2d 443.

It should be observed that Form 6 of the Appendix of Forms does not provide for either the name of or a more detailed description, such as the engine number, etc. It merely provides for a "stolen motor vehicle" in setting forth a suitable form for charging a violation of the Dyer Act.

Additional illustrations of the tendency to liberally construe the sufficiency of indictments by this Court are the following.

With regard to a perjury charge that failed to allege that the testimony given was in fact false and where the indictment was held good. See:

Flynn v. United States, 9 Cir., 1949, 172 F. 2d 12.

Another perjury indictment held to be sufficient, although it did not allege that the officer administering the oath had competent authority to administer same, is

United States v. Bickford, 9 Cir., 1948, 168 F. 2d 26.

And again this Court sustained a challenged count of an indictment charging the presentation of false claims and for aiding and abetting in so doing in

McCoy v. United States, 9 Cir., 1948, 169 F. 2d 776, at pp. 779-780.

"Appellant's construction of the indictment is too narrow. In the first place every particular relating to the charge is not required to be set out in the indictment, and it is not required that every possible combination of facts, which would constitute legal acts, should be negatived in it. Hopper v. United States, 9 Cir., 142 F. 2d 181. * * * The indictment must be considered as a whole, and the violated statute is cited in it and plainly informs the accused of the law allegedly violated."

Also note:

Eisler v. United States, C. A. D. C., 1948, 170 F. 2d 273, pp. 280-281.

It would, therefore, appear that the complaint was sufficient and adequately supported the warrant of arrest.

III.

The Warrant Was Valid and Justified the Arrest Conducted by the Federal Bureau of Investigation and the Attendant Search.

The arrest and the search in this case stands or falls upon the sufficiency of the complaint and the warrant of arrest. This is not a case where the officers justified their position because of a reasonable ground of believing that the person arrested was guilty of a felony and was likely to escape before a warrant could be obtained. It, therefore, appears to be beside the point to argue upon such an issue.

Appellee relies entirely upon the warrant of arrest issued pursuant to Rule 4(a) and (b)(1) and the sufficiency of the supporting complaint. Rule 4 of the Federal Rules of Criminal Procedure, in part, provides:

> "Warrant or Summons upon Complaint
>
> (a) Issuance. If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. * * *"

It is to be noted that a warrant is authorized to issue if probable cause is reflected from the complaint. It is submitted that probable cause is reflected from the instant complaint. The rule further provides that the warrant "* * * shall issue to any officer authorized by law to execute it."

The warrant in this case was directed "To United States Marshal or any other authorized officer." By reason of 18 United States Code, Section 3052, agents of the Federal

Bureau of Investigation are specifically authorized to "serve warrants", and "make arrests." (This section is set forth on page 12 of Appellant's Opening Brief.)

The arguments presented under the preceding sub-head *i. e.* II are referred to as additional authority in support of the validity of the warrant of arrest and shall, therefore, not be repeated at this point.

IV.

The Search Conducted Was Lawful and Incidental to a Valid Arrest.

A. An Order of a Trial Court in Denying a Motion to Suppress and/or Return Seized Property Is Not to Be Reversed if Fairly Supported by the Evidence Before Such Court.

Prior to discussing the proposition that the search was lawful and incidental to a valid arrest, it would appear proper to briefly comment on the principle set forth in the immediate preceding sub-heading.

In the instant case, a distinct conflict as to certain facts is reflected in the various affidavits presented before the District Court. This conflict is apparent, hence will not be specifically analyzed in this brief. It pertains chiefly as to what Mrs. Weldon or her husband, Mr. Weldon, said or are alleged to have stated when inquired of as to whether there was any money in the house at the time the search was conducted [R. 21], also that Mrs. Weldon at no time stated the money found in the cigarette case belonged to her, although she was asked this specific question several times. [R. 22-23.] Further, Mrs. Weldon's admission that an observed $50.00 bill was the only $50.00 bill she had. [R. 26.] Mrs. Weldon's statement before

the search was started to the effect that there was no money in the house. [R. 26.] Mr. Weldon's statement concerning a bill of sale found which referred to a sale of a Crosley automobile by Weldon to Anita Price on June 13, 1950, which Crosley automobile was parked in front of the house and was the one described in the bill of sale and which car had been seen by an agent while it was being driven by Mr. Weldon on a date subsequent to the date of the bill of sale. [R. 17.]

It is conceded that appellants' affidavits either challenged the assertion contained in the affidavits submitted by the Government or attempted to give explanations of their positions.

It is a well established principle of law that upon appeals from verdicts the sufficiency of the evidence is generally a jury question.

To this effect:

Hemphill v. United States, 9 Cir., 1941, 120 F. 2d 115; cert. den. 314 U. S. 627.

It is also true that such evidence will be by the Appellate Court considered most favorable to the prosecution.

See:

Henderson v. United States, 9 Cir., 1944, 143 F. 2d 681.

A similar rule seems to prevail in the consideration of conflicting evidence when appealing from an order denying a motion to suppress or return seized properties. In other words, if the question of fact presented was resolved on conflicting and substantial evidence, such evidence may not be weighed by an Appellate Court.

To this effect:

Lowrey v. United States, 8 Cir., 1947, 161 F. 2d 30, at 34; cert. den. 331 U. S. 849.

In seeking a review from an order denying the suppression of certain evidence, the law appears to state that the creditability of testimony is for the District Judge. See:

In re Fried, 2 Cir., 1947, 161 F. 2d 453; cert. den. 331 U. S. 858.

A finding respecting the validity of a search and seizure which has substantial support in the evidence and it is reasonable inference must stand on appeal. See:

Gilbert v. United States, 10 Cir., 1947, 163 F. 2d 325.

It is, therefore, submitted that the factual matters as contained in the several affidavits presented a conflict, but that there was substantial evidence contained in such affidavits to support the District Court's order in denying the petitions of the appellants.

* * * * * * * * *

Discussion shall now refer back to the main heading, *i. e., The search conducted was lawful and incidental to a valid arrest.*

One of the latest cases of the Supreme Court on the subject of search and seizure, based entirely upon a warrant of arrest and without a search warrant, is the arrest and search conducted in the case pertaining to forged postal stamps, namely:

United States v. Rabinowitz, 1950, 339 U. S. 56.

This case reviews many of the landmark search and seizure cases.

The arrest and the attendant search were sustained. The opinion supports the validity of a general search of the accused office without a search warrant following a proper arrest on a charge of selling altered postal stamps as incident to such arrest, even though the officers had knowledge that the accused had other altered stamps and could readily have obtained a search warrant. After referring to the case of *Agnello v. United States,* 269 U. S. 20, 30, and quoting therefrom, the opinion in the *Rabinowitz* case contains the following, significant language:

> "The right 'to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed' seems to have stemmed not only from the acknowledged authority to search the person, but also from the long-standing practice of searching for other proofs of guilt within the control of the accused found upon arrest. Weeks v. United States, 232 U. S. 383, 392. * * * (P. 61.)
>
> * * * * * * * *
>
> What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are 'unreasonable' searches and, regrettably, in our discipline we have no ready litmus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case. Go-Bart Co. v. United States, 282 U. S. 344, 357. * * * (P. 63.)
>
> * * * * * * * *
>
> A rule of thumb requiring that a search warrant always be procured whenever practicable may be appealing from the vantage point of easy administra-

tion. But we cannot agree that this requirement should be crystallized into a *sine qua non* to the reasonableness of a search. It is fallacious to judge events retrospectively and thus to determine, considering the time element alone, that there was time to procure a search warrant. Whether there was time may well be dependent upon considerations other than the ticking off of minutes or hours. The judgment of the officers as to when to close the trap on a criminal committing a crime in their presence or who they have reasonable cause to believe is committing a felony is not determined solely upon whether there was time to procure a search warrant. Some flexibility will be accorded law officers engaged in daily battle with criminals for whose restraint criminal laws are essential.

It is appropriate to note that the Constitution does not say that the right of the people to be secure in their persons should not be violated without a search warrant if it is practicable for the officers to procure one. The mandate of the Fourth Amendment is that the people shall be secure against unreasonable searches. It is not disputed that there may be reasonable searches, incident to an arrest, without a search warrant. Upon acceptance of this established rule that some authority to search follows from lawfully taking the person into custody, it becomes apparent that such searches turn upon the reasonableness under all the circumstances and not upon the practicability of procuring a search warrant, for the warrant is not required. To the extent that Trupiano v. United States, 334 U. S. 699, requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case is overruled. The relevant test is not whether it is reason-

> able to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case. * * *" (Pp. 65-66.)

An additional case supporting as reasonable a search and seizure where the officers had only a warrant for an arrest for alleged violations of the mail fraud statute and the National Stolen Property Act, and, while so searching and after having spent many hours in the apartment, found evidence of an entirely *different* crime, namely, papers, cards, etc., indicating a violation of the Selective Training and Service Act, is:

Harris v. United States, 1947, 331 U. S. 145.

Toward the close of the affirming opinion in the *Harris* case, the Court observes:

> "* * * But we should not permit our knowledge that abuses sometimes occur to give sinister coloration to procedures which are basically reasonable. * * *" (P. 155.)

Thus, in the *Harris* case, the agents, without a search warrant searched the apartment, that is, the living room, bedroom, kitchen and bath, intensively for five hours for two concealed checks, and any other means by which the crimes charged might have been committed. In so doing, beneath some clothes in a bedroom bureau drawer, they discovered several draft cards, the possession of which was a Federal offense.

The *Harris* case establishes that a search incident to an arrest may extend beyond the person of one arrested and to the premises under his immediate control. Such a search

is not rendered invalid by the fact that the place searched is a dwelling rather than a place of business. It may also extend beyond the room in which the accused is arrested.

> "The Fourth Amendment has never been held to require that every valid search and seizure be effected under the authority of a search warrant. Search and seizure incident to lawful arrest is a practice of ancient origin and has long been an integral part of the law-enforcement procedures of the United States and of the individual states.
>
> The opinions of this Court have clearly recognized that the search incident to arrest may, under appropriate circumstances, extend beyond the person of the one arrested to include the premises under his immediate control. Thus in Agnello v. United States, *supra,* at 30, it was said: 'The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted.' It is equally clear that a search incident to arrest, which is otherwise reasonable, is not automatically rendered invalid by the fact that a dwelling place, as contrasted to a business premises, is subjected to search."

It is not appellee's intention to discuss all the authorities cited by appellants with reference to the law on search and seizure. The *Rabinowitz* and the *Harris* opinions recognize that the reasonableness of searches must find resolution in the facts and circumstances of each case.

A case relied upon by appellants, *Go-Bart Importing Co. v. United States,* 282 U. S. 344, contains the following, at page 357:

> "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances."

The case of *Weeks v. United States,* 232 U. S. 383 (1914), cited by appellants is not applicable to the facts presented here. In the *Weeks* case, Weeks was arrested at his office by police officers without a warrant. They later went to his home, found the key and entered without a warrant and searched and obtained private papers, which were turned over to the United States Marshal. On the same day, the Marshal, without a warrant, accompanied the police officers to defendant's home and seized personal letters of the defendant. Permitting the use of the letters obtained by the Marshal was prejudicial error.

Likewise, the case of *Gouled v. United States,* 1921, 255 U. S. 298, is not to point. In the *Gouled* case, papers were surreptitiously taken from the office of defendant by a "friend" acting under directions of a Government agency. Other papers were obtained by search warrant, but the same were not pertinent to the case.

In *Agnello v. United States,* 269 U. S. 20, 1925, also relied upon by appellants, an entirely different situation existed as compared to the instant case. In the *Angello* case, the arresting officers saw defendant through a window at a co-defendant's house violating the narcotics law, rushed in, arrested defendants, and found a number of packages of cocaine in Agnello's pocket and seized same. The officers then went to Agnello's home and searched it without a search warrant, finding a can of cocaine in de-

fendant's bedroom, which was produced at the trial. The Court held the subsequent search of defendant's home without a search warrant was illegal and not incidental to his arrest.

The *Agnello* case contains this language, at page 30:

> "The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted. See Carroll v. United States, 267 U. S. 132, 158; * * *"

The case of *Carroll v. United States,* 267 U. S. 132, at 158, recognizes that when a man is legally arrested for an offense, whatever is found upon his person or in his *control,* which is unlawful for him to have and which may be used to prove the offense, may be seized and held as evidence.

To like effect:

Brinegar v. United States, 1949, 338 U. S. 160.

A case containing exhaustive research on the subject of search and seizure is that of:

United States v. Bell, 1943, 48 Fed. Supp. 986.

Many of the authorities cited by appellants in their brief, and others, are analyzed in the *Bell* opinion. The *Bell*

opinion, page 997, in referring to "exploratory" seizures, comments on such as follows:

> "When the cases condemn 'exploratory' investigations or 'exploratory' seizures, they refer to the unlimited seizure of the type which occurred in United States v. Lefkowitz, *supra,* and other cases where the officers were merely seeking, *in an unrestrained manner,* evidence which did not relate to the offense."

A search of a hotel room and a suitcase found in a closet following defendant's arrest in the hotel room was held to be fairly incidental to his arrest and lawful.

To such effect:

United States v. Petti, 2 Cir., 1948, 168 F. 2d 221.

A case dealing with a search conducted in making an arrest for an offense charged under the Bankruptcy Act and where it was held that such search was not exploratory is that of:

Matthews v. Correa, 2 Cir., 1943, 135 F. 2d 534.

In the above case, the defendant was charged with concealing money, etc. from the Trustee in bankruptcy. The defendant contended her house was searched "from cellar to roof." This case contains the following, at page 537:

> "* * * Under the circumstances of the charge, it would seem most appropriate that the officers should look around for property concealed or withheld from the bankruptcy trustee; and if they found it or docu-

ments concerning it, this would be matter which they should retain. The line between fruit of the crime itself and mere evidence thereof may be narrow; perhaps this turns more on the good faith of the search than the actual distinction between the matters turned up. In any event, the articles in question are more than evidential; they are the very things withheld.

Nor can we say that the intensity of the search exceeded reasonable bounds. * * *"

Before closing our discussion on this point, we call attention that the Fourth Amendment forbids only *unreasonable* searches, or as said in:

United States v. Rabinowitz, 1949, 339 U. S. 56, 65.

"It is appropriate to note that the Constitution does not say that the right of the people to be secure in their persons should not be violated without a search warrant if it is practicable for the officers to procure one. The mandate of the Fourth Amendment is that the people shall be secure against *unreasonable* searches. * * *"

Inasmuch as we believe we have already discussed them, no further specific comment shall be had to the matters presented in Appellants' Opening Brief under the designations of Points 4, 5 and 6.

Conclusion.

Appellee respectfully submits that the search and seizure conducted were not unreasonable, that they were incidental to a lawful arrest and that the order of the trial court in denying the petitions of both appellants should be affirmed.

Respectfully submitted,

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Attorneys for Appellee.

No. **12818**

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SETH J. A. WELDON and DOROTHY WELDON,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' REPLY BRIEF

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IN THE

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SETH J. A. WELDON and DOROTHY WELDON,
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UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' REPLY BRIEF

Jurisdictional Statement

Appellee's suggestion that Seth J. A. Weldon has no right of appeal is hardly a contention to that effect.

Said appellant relies on the following cases:

U.S. vs. *Poller*, 43 F. 2d 919,

Perlman vs. *U.S.*, 247 U.S. 7; 38 S.Ct. 417,

Burdeau vs. *McDowell*, 256 U.S. 465

In re Milburne, 77 F. 2d 310,

In re Sana Laboratories, 115 F. 2d 717,

Cogen vs. *U.S.*, 278 U.S. 221, 225; 49 S.Ct. 118,

Go-Bart Importing Co. vs. *U.S.*, 282 U.S. 344, 356; 51 S.Ct. 153,

to sustain his right to prosecute this appeal.

Further Statement of Facts

It should be pointed out, in amplification of the statement of facts made by appellants herein, that the following-described property mentioned in the motions filed herein,

> The sum of $28.51, and the
> Bill of sale of furniture,

has been returned to petitioners and is not the subject of the present appeal. (R. 59)

Said appeal has to do with the motion to return and to suppress:

> $900.00, and
> One cigarette case,
> the property of Dorothy Weldon,
> Bill of Sale for Crosley automobile,
> in the possession of Dorothy Weldon,
> Index card,
> the property of appellant, Seth J. A. Weldon.

Argument

I

OWNERSHIP OF THE PROPERTY

There is little conflict in the evidence presented by the affidavits on which the motions were tried by the trial court. There was no direct contradiction of the proof that the $900.00 in question was the property of Dorothy Weldon; and the only conflict in the evidence pointed out by appellee having anything to do

with money belonging to Dorothy Weldon is based on minor circumstances—one as to a $50.00 bill, and another as to the alleged failure of Mrs. Weldon to explain, at the time of her arrest, the source of the $900.00 or to claim it as her property. As a matter of fact Mrs. Weldon not only made lengthy explanation as to the source of her money in her affidavit filed in support of her motion (R. 10); but she also explained to the officers at the time of the arrest that the money belonged to her and had come to her from Mr. Sussman. (R. 42).

The alleged statement of Mrs. Weldon to Agent Haack that when she married she did not have any money and did not even have proper clothes is explained and denied by Mrs. Weldon. (R. 41)

It therefore stands without substantial conflict that Mrs. Weldon was the owner of the sum of $900.00, and there is no doubt of her ownership of the cigarette case. It is established without conflict in the evidence that she was in the lawful possession of the bill of sale for the Crosley automobile; and it also appears without conflict that Mr. Weldon is the owner of the index card.

Ownership of the property is not important in cases of this kind. It is enough that petitioners were entitled to its possession.

It is a false issue as to who, as between Mr. and Mrs. Weldon, may own the sum of $900.00. Each petition asks for its return; and the appellee is in no position

to question the right of one or the other of appellants to the money—although both appellants allege that the money belongs to Mrs. Weldon; and each petition was for its return to her.

II

THE COMPLAINT WAS INSUFFICIENT; THEREFORE THE WARRANT WAS INVALID; THEREFORE THE ARREST WAS ILLEGAL.

In addition to the cases, cited in appellants' opening brief, they desire to cite the additional authority—

U.S. vs. *Lynch*, 11 F. 2d 298,

where on a charge of concealment of assets, namely: "certain goods, wares, merchandise, moneys, funds, credits and other things of value, a further and more particular description thereof being" unknown—and without any further description or allegation of value, it was held that the indictment was insufficient.

In *Kanner* vs. *U.S.*, 21 F. 2d 285,

relied on by appellee, it was alleged that the property consisted of *moneys* and other properties of divers amounts, the exact and more particular description of which was to the grand jurors unknown.

In *Greenbaum* vs. *U.S.*, 287 F. 474,

referred to in *Kanner vs. U.S.*, supra, the indictment charged concealment of "a large portion of the prop-

erty belonging to the bankrupt estate, said property consisting of money and merchandise to the value of $30,000.00. In that case a bill of particulars was furnished. Indictment held sufficient.

In *Keslisky* vs. *U.S.*, 12 F. 2d 767,

the indictment charged concealment from the trustee of "certain goods, wares, moneys, merchandise, shoes and personal property belonging to said bankrupt estate, a more particular description of which is to your Grand Jurors otherwise unknown." A letter which was considered as a bill of particulars showed that the moneys were proceeds of goods sold from the accused's stock, and that the shoes and other goods mentioned were removed from the store.

Appellee refers to the forms for indictments appearing in Appendix A to Federal Criminal Rules Annotated, in an effort to support the sfficiency of the complaint.

Appellants therefore call attention to Form 9 which at least sets forth the amount of the money in a charge for obtaining money by impersonation of a Federal officer; and Form 10, an indictment for presenting fraudulent claims against the United States, describes the property as 100,000 lineal feet of No. 1 white pine lumber; and Form 4 for sabotage describes the making of defective *shells;* and Form 2 for murder describes the *name* of the person killed.

In no case cited by appellee has the Court sustained so barren a charge as appears in the complaint in this

case where the only statement was that the accused concealed *"property"* belonging to the said bankrupt estate.

For aught any one knows the *property* Weldon was charged with concealing was anything from a pin to a locomotive. Appellants therefore confidently contend that the complaint in this case is insufficient to support the warrant of arrest; that the warrant of arrest is invalid for that reason; and also that the arrest was as if without a warrant. (*U.S.* vs. *Haberkorn*, 149 F. 2d 720)

It is to be noted that appellee makes no effort whatever to distinguish the case of *U.S. vs. Haberkorn*, supra, nor to show that the rule of law there announced as to the limited authority of agents of the F.B.I. to make arrests without a warrant is inapplicable here.

Weldon was not engaged in the commission of any offense, and he was not likely to escape.

III

THE SEARCH WAS NOT LAWFULLY INCIDENTAL TO AN ARREST. IT WAS UNLIMITED AND EXPLORATORY, IN SEARCH OF EVIDENCE, AND IT WAS UNREASONABLE AND ILLEGAL.

Under this heading appellee cites recent cases, apparently in an effort to contend that the old landmarks on this subject such as

> *Boyd* vs. *U.S.*, 116 U.S. 616; 6 S.Ct. 524,
> *Weeks* vs. *U.S.*, 232 U.S. 383; 34 S.Ct. 341,

Gouled vs. *U.S.*, 255 U.S. 298; 41 S.Ct. 261,

Go-Bart Importing Co. vs. *U.S.*, 282 U.S. 344; 51 S.Ct. 153,

U.S. vs. *Lefkowitz*, 285 U.S. 452; 52 S.Ct. 420,

no longer express the law applicable to the subject of what constitutes a *reasonable* search and seizure under the Fourth Amendment.

We do not believe that any one of the late cases cited by appellee has so far departed from the long-established principles laid down by the famous decisions of Justices Bradley, Day, Clarke, and Butler as to be controlling here.

The break from previous holding, if break there be, can be fairly said to turn principally on what constitutes an *unreasonable* search.

In *Harris* vs. *U.S.*, 331 U. S. 145; 67 S. Ct., 1098,

the officers, holding warrants of arrest, searched for two forged checks, the subject matter of the complaints supporting the warrants. In the course of the search they found a large number of draft cards, the property of the United States—which draft cards were properly subject to seizure as *instrumentalities of crime*—as distinguished from property which would have been merely evidentiary of crime.

In *Matthews* vs. *Correa*, 135 F. 2d 534,

the officers seized fruits of a crime committed *in their presence* while they were engaged in making a lawful search. It was averred and apparently held that the books seized contained evidence of receipts and disbursements—valuable evidence connected with the crime charged.

In *U.S.* vs. *Rabinowitz*, 339 U.S. 561; 70 S.Ct. 430,

while making a search under a warrant of arrest for four forged postage stamps, the subject matter of a complaint, the officers seized 573 forged stamps—the mere *possession* of which *constituted a felony* committed in their very presence.

We think all three of said cases are distinguishable from this Weldon case.

Judge Yankwich does say in

In *U.S.* vs. *Bell*, 48. F. Supp. 986,

that later cases have whittled away the protection given by the Fourth Amendment under the older cases, and it must be acknowledged, as shown by the strong dissenting opinions in those cases, that there is a basis for Judge Yankwich's remark.

However, we are on solid ground here—notwithstanding what has been recently decided—for the following reasons:

1. The complaint was defective and insufficient to support or provide probable cause for the warrant of arrest; and the arrest was as if without a warrant.

2. The agents of the F.B.I. had no authority whatever under the facts in this case to arrest without a warrant. Such agents have only limited authority to make arrests.

3. There was no search warrant.

4. The search as made was manifestly unlimited and exploratory, in search of whatever could be found. The officers had no idea whatever what they were looking for. The arrest was merely an excuse for the search. The search was the primary thing. All facts and circumstances, including the vague and uncertain complaint, show this to be true.

5. The property seized was not contraband; and it is not shown to have been the proceeds of or in any way connected with any concealment of property of the bankrupt estate.

The source of the $900.000 was duly explained. The cigarette case was not shown to belong to the bankrupt estate. The bill of sale for the Crosley car belonging to Mrs. Prince was not shown to be in any way related to the charge; and it was in the lawful possession of Mrs. Weldon. The index card is not shown to contain any evidence whatever; and it belongs to Weldon.

Apellants respectfully contend, therefore, that the orders should be reversed and the property returned—the $900.000, the cigarette case, and the bill of sale for the Crosley car to Dorothy Weldon, and the index card to Seth J. A. Weldon; and all such property should be suppressed as evidence.

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CRANDALL CONDRA

By Clarence Harden

Attorneys for Appellants

No. 12818

United States
Court of Appeals
For the Ninth Circuit

SETH J. A. WELDON and DOROTHY WELDON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Petition for Rehearing

Appeal from the United States District Court for the Southern District of California, Southern Division.

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Petition for Rehearing

Appeal from the United States District Court for the Southern District of California, Southern Division.

Each of the appellants, SETH J. A. WELDON and DOROTHY WELDON, respectfully petitions the Court for a rehearing of the above-entitled matter and to set aside the decision and judgment of the above-entitled Court filed herein May 17, 1952, whereby the appeal of each of appellants was dismissed.

Grounds of Petition:

The grounds of the Petition for Rehearing are that the Court erred in holding—

1. That the law or rules require that the so-called minute order (of December 8, 1950) be noted in the civil docket of the district court.

2. That the "record does not show that the district court or any judge thereof wrote or filed the so-called minute order or caused it to be written or filed or directed that it be entered."

3. That said minute order cannot be regarded as an order of the district court.

ARGUMENTS AND AUTHORITIES

POINT I.
MINUTE ORDER NEED NOT HAVE BEEN NOTED IN CIVIL DOCKET

Basis of Court's decisions:

The basis of the Court's decision is that the notices of motion and motions filed by each of the appellants were in effect civil actions, requiring compliance with the rules of civil procedure of the district court as to making and entry of the minute order of the court as if it amounted to a judgment. Appellants urge that that is a fundamental error in this Court's opinion.

The cases cited by the Court in the footnotes appended to the opinion, namely,

Wright vs. Gibson, (9th Cir.) 128 F. (2d) 865;
Uhl vs. Dalton, (9th Cir.) 151 F. (2d) 502;
Kam Koon Wan vs. E. E. Black, Ltd., (9th Cir.) 182 F. (2d) 146,

were civil actions pure and simple. Neither case is an exact precedent for the order of dismissal of the appeal made in the case at bar.

Remedies Which Were Available to Appellants in District Court:

That the appellants had available to them several allowable courses of procedure to bring about the return of their property is established by many adjudicated cases:

United States vs. Poller, 43 F. (2d) 911;
Perlman vs. United States, 247 U. S. 7;
Burdeau vs. MacDowell, 256 U. S. 465;
In re Milburne, 77 F. (2d) 310;
In re Sana Laboratories, 115 F. (2d) 717;
Go-Bart Importing Co. vs. United States, 282 U. S. 344.

Said cases, particularly illustrate instances where the moving parties proceeded sometimes by motion and sometimes by order to show cause.

Undoubtedly they may file an independent action in equity, as was done in

Dowling vs. Collins, (6th Cir.) 10 F. (2d) 62.

One of the leading cases in which mention is made of the available courses of procedure is

Goodman vs. Lane, (8th Cir.) 48 F. (2d) 32.

In said case, it is stated (page 35):

"2. Under certain circumstances, a summary motion may be made in United States District Court which has control of the preparatory and preliminary acts and steps leading up to a criminal prose-

cution of the owner of the property. The full and complete relief, however, afforded by such motion is equitable in character. It consists in enjoining the officers from making use of the property as evidence, and in ordering the property restored to its owner. See Go-Bart Importing Co. vs. United States, 282 U. S. 344. That case, however, did not hold that a plenary bill in equity was not a proper method of procedure."

In said case (page 35), the court discusses the propriety of the common law remedy of replevin, holding that it would appear that replevin is forbidden by a federal statute; but the court says further (page 35):

"5. The questions of return of property illegally seized, and/or the suppression of the same as evidence, are presented to the courts by various methods of procedure. There is no uniformity throughout the several circuits, and oftentimes not within the same circuit. Independent petitions, either before or after criminal proceedings are started, summary motions or petitions in criminal cases after indictment or information, independent bills in equity, are all recognized by the courts as proper. The practitioner will doubtless choose the method which best suits his particular case. Delays may arise in any method of procedure. But as criminal cases are given precedence in the trial and appellate courts, doubtless bills in equity closely related to criminal cases could secure like precedence. But however this might be, the jurisdiction of the federal equity court cannot be made to depend upon such considerations."

This Court's decision dismissing our appeal is erroneous unless it be true that our motions for return and suppression of evidence amounted to civil actions. Unless said motions did amount to civil actions, it would appear to appellants that there is no basis whatever for requiring compliance with Rules 58 and 79 (a) of the Federal Rules of Civil Procedure.

The scope of said Rules of Civil Procedure is stated in Rule 1 thereof:

> "These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action."

Rule 2 provides:

> "There shall be one form of action to be known as 'civil action.' "

Appellants' Motions in District Court were authorized by the Rules of Criminal Procedure:

Rule 41 (e) of the Federal Rules of Criminal Procedure of the United States District Court reads as follows:

> "*Motion for return of property and to suppress evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground

that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

An enlightening comment on said rules is found in the notes of the advisory committee on rules appended to said Rule 41 (e), appearing in Title 18 U. S. C. A. Federal Rules of Criminal Procedure at page 463 as follows:

"This rule is a restatement of existing law and practice, with the exception hereafter noted, 18 U. S. C. A. former sections 625, 626; Weeks vs. United States, 232 U. S. 383; Silverthorne Lumber Co. vs. United States, 251 U. S. 385; Agnello vs. United States, 269 U. S. 20; Gouled vs. United States, 255 U. S. 298. While under existing law a motion to suppress evidence or to compel return of property obtained by an illegal search and seiz-

ure may be made either before a commissioner subject to review by the court on motion, or before the court, the rule provides that such motion may be made only before the court. The purpose is to prevent multiplication of proceedings and to bring the matter before the court in the first instance. While during the life of the Eighteenth Amendment when such motions were numerous it was a common practice in some districts for commissioners to hear such motions, the prevailing practice at the present time is to make such motions before the district court. This practice, which is deemed to be preferable, is embodied in the rule."

Since said Rule 41 (e) permits the making of the motions which appellants did make in the district court, the question arises as to what is a motion. The general understanding of the bar as to the nature of a motion, as distinguished from an action, is expressed in the definition of a motion in Section 1003, California Code of Civil Procedure as follows:

"An application for an order is a motion."

An order is defined by the same section as follows:

"Every direction of a court, judge, or justice, made or entered in writing, and not included in a judgment, is denominated an order."

A notice of motion is equivalent to an order to show cause.

McAuliffe vs. Coughlin, 105 Cal. 268;
Schoenfeld vs. Gerson, 48 Cal. App. (2d) 739.

Federal Rules Contain No Provision for Entry of an Order made Pursuant to motion under Rule 41 (e) of Federal Rules of Criminal Procedure in the Civil Docket:

Rule 58 of the Rules of Civil Procedure applies in words to the instances where the clerk may enter judgment and to the other instances where judgment must be ordered by the judge; and neither that rule nor Rule 79 (a) has any just application to our case.

After a careful examination of the Rules of Criminal Procedure, we find no provision for entry of any order of the court in the civil docket or elsewhere; and said rules do not provide, so far as we can learn, for the signing of any orders by the court. Certainly our long experience at the bar teaches us that customarily minute orders are not signed by judges. As a matter of fact, historically speaking, the judgment of the court need not be signed unless expressly provided for by statute or rule.

The suggestion of this Honorable Court made at the time of the oral argument in Los Angeles that such motions as appellants made before the district court must have been ancillary to some other proceeding is not well taken. There are too many instances where the district court and other Federal courts have entertained such motions, often entirely independent of any other proceedings, to justify that contention.

Furthermore, the holding of this Honorable Court that the order must have been entered in the judgment docket as a judgment has taken us all by surprise. The

augmented record before this court will not disclose the payment of any filing fees by appellants for the filing of their motions; and in fact no such fees were paid.

It is pointed out that in instances where parties have filed motions before United States commissioners for return of seized property, it could not possibly be held that such motions amounted to civil actions. The United States commissioner is not even a judge; and his proceedings are not proceedings before a court. No argument is needed to establish these facts.

A review of such proceedings before the United States commissioner by the district court would not make a civil action out of said proceedings either.

How then can it be contended that the making of such a motion, pursuant to Rule 41 (e) of the Federal Rules of Criminal Procedure, converted such a motion into a civil action requiring compliance with the Rules of Civil Procedure as to entry of a judgment?

POINTS II AND III.

MINUTE ORDER NEED NOT HAVE BEEN SIGNED BY JUDGE; INCLUSION OF MINUTE ORDER IN RECORD PREPARED BY CLERK RAISES PRESUMPTION OF REGULARITY.

If our Point I is well taken, it will be unnecessary to consider our Point II and III as above stated.

If the minute order of the court was not a judgment and if the motions were not civil actions, then we need not consider whether the signature of the judge was required.

In that event, presumptions of law will furnish the complete answer:

The inclusion of the minute order of December 8 in the record on file in this case, under the certificate of the clerk, raises the presumption that said order was made by the judge and was regular in every way.

> Section 1963 California Code of Civil Procedure, Subd. 15;
> Section 167 American Jurisprudence, page 172.

Innumerable instances could be cited to this court where the presumption of regularity of judicial proceedings has been indulged; and certainly this court will indulge that presumption and will hold that the minute order in question was an order made and directed by the judge of the district court, provided the

court agrees with appellants that said order did not amount to a judgment in a civil action.

Respectfully submitted

CLARENCE HARDEN
CRANDALL CONDRA
Attorneys for Appellants.

CERTIFICATE OF ATTORNEYS

We, CLARENCE HARDEN and CRANDALL CONDRA, attorneys for appellants, hereby certify that the foregoing Petition for Rehearing is, in our judgment, well taken, and that it is not taken or made for delay.

Clarence Harden
Crandall Condra